

IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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	:	
In re	:	Chapter 11
	:	
DPH HOLDINGS CORP., et al.,	:	Case No. 05-44481 (RDD)
	:	
Reorganized Debtors.	:	(Jointly Administered)
	:	
-----	X	

AFFIDAVIT OF SERVICE

I, Darlene Calderon, being duly sworn according to law, depose and say that I am employed by Kurtzman Carson Consultants LLC, the Court appointed claims and noticing agent for the Reorganized Debtors in the above-captioned cases.

On May 17, 2012, I caused to be served the document listed below (i) upon the parties listed on Exhibit A hereto via overnight mail, (ii) upon the parties listed on Exhibit B hereto via electronic notification, and (iii) upon the party listed on Exhibit C hereto via postage pre-paid U.S. mail:

Reorganized Debtors' Objection to Motion of Ontario Specialty Contracting, Inc. for Allowance of an Administrative Claim Pursuant to 11 U.S.C. § 503(b)(1)(A), or in the Alternative, for Leave to File a Late Administrative Expense Claim Pursuant to Federal Rule of Bankruptcy Procedure 9006(b) ("Objection to Ontario Specialty Contracting, Inc.'s Late Claim Motion") (Docket No. 21886) [a copy of which is attached hereto as Exhibit D]

Dated: May 22, 2012

/s/ Darlene Calderon

Darlene Calderon

State of California  
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 22<sup>nd</sup> day of May, 2012, by Darlene Calderon, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature: /s/ Lydia Pastor Nino

Commission Expires: 11/18/15

# **EXHIBIT A**

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Wachtell, Lipton, Rosen & Katz	Richard G. Mason	51 West 52nd Street		New York	NY	10019-6150		212-403-1000	212-403-2000	<a href="mailto:RGMason@wlrk.com">RGMason@wlrk.com</a>	Counsel to Capital Research and Management Company
Warner Norcross & Judd LLP	Gordon J. Toering	900 Fifth Third Center	111 Lyon Street, N.W.	Grand Rapids	MI	49503		616-752-2185	616-222-2185	<a href="mailto:gtoering@wnj.com">gtoering@wnj.com</a>	Counsel to Robert Bosch Corporation; Counsel to Daewoo International Corp and Daewoo International (America) Corp
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COMPANY	CONTACT	ADDRESS1	ADDRESS2	CITY	STATE	ZIP	COUNTRY	PHONE	FAX	EMAIL	PARTY / FUNCTION
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## **EXHIBIT C**

## Post-Emergence Master Service List

COMPANY	CONTACT	ADDRESS1	ADDRESS2	CITY	STATE	ZIP	PHONE	PARTY / FUNCTION
United States Trustee	Brian Masumoto	33 Whitehall Street	21st Floor	New York	NY	10004-2112	212-510-0500	Counsel to United States Trustee

## **EXHIBIT D**

**Hearing Date And Time: May 24, 2012 at 10:00 a.m. (prevailing Eastern time)**

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DPH Holdings Corp. Legal Information Hotline:  
Toll Free: (800) 718-5305  
International: (248) 813-2698

DPH Holdings Corp. Legal Information Website:  
<http://www.dphholdingsdocket.com>

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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	:	
In re	:	Chapter 11
	:	
DPH HOLDINGS CORP., <u>et al.</u> ,	:	Case No. 05-44481 (RDD)
	:	
Reorganized Debtors.	:	(Jointly Administered)
	:	
-----	X	

REORGANIZED DEBTORS' OBJECTION TO MOTION OF ONTARIO SPECIALTY  
CONTRACTING, INC. FOR ALLOWANCE OF AN ADMINISTRATIVE CLAIM  
PURSUANT TO 11 U.S.C. § 503(b)(1)(A), OR IN THE ALTERNATIVE, FOR LEAVE  
TO FILE A LATE ADMINISTRATIVE EXPENSE CLAIM PURSUANT  
TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9006(b)

("OBJECTION TO ONTARIO SPECIALTY CONTRACTING, INC.'S  
LATE CLAIM MOTION")

DPH Holdings Corp. ("DPH Holdings") and its affiliated reorganized debtors in the above-captioned cases (together with DPH Holdings, the "Reorganized Debtors"), formerly known as Delphi Corporation ("Delphi") and certain of its subsidiaries and affiliates, former debtors and debtors-in-possession (collectively, the "Debtors"), hereby object (the "Objection") to Ontario Specialty Contracting, Inc.'s Motion For Allowance Of An Administrative Claim Pursuant To 11 U.S.C. § 503(b)(1)(A), Or In The Alternative, For Leave To File A Late Administrative Expense Claim Pursuant To Federal Rule Of Bankruptcy Procedure 9006(b) (Docket No. 21878) (the "Motion"), dated May 4, 2012, requesting allowance of an untimely filed administrative expense claim or, in the alternative, for leave to pursue its untimely filed claim. In support of this Objection, the Reorganized Debtors respectfully represent as follows:

### **PRELIMINARY STATEMENT**

1. In the Forty-Third Omnibus Claims Objection<sup>1</sup> (Docket No. 19356), the Reorganized Debtors objected to the late filed proof of administrative expense claim number 19873 (the "Administrative Expense Claim") filed by Ontario Specialty Contracting, Inc. ("Ontario") on the basis that the Administrative Expense Claim was not reflected in the Reorganized Debtors' books and records. The Administrative Expense Claim concerns allegations asserted by Ontario for breach of a July 24, 2008 purchase order, as asserted in its counterclaim asserted in an action pending in New York state court (the "Contract Action").<sup>2</sup> Ontario asserts that it should be permitted to pursue the untimely Administrative Expense claim because (i) the Reorganized Debtors are barred from objecting to the Administrative Expense Claim as untimely, (ii) its claim did not become "ripe" until after the applicable June 1, 2009 bar

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<sup>1</sup> Capitalized terms used but not defined in this Preliminary Statement are defined below.

<sup>2</sup> Delphi Automotive Systems, LLC v. Ontario Specialty Contracting, Inc., Index No. I2009010438 (N.Y. Sup. Ct. Erie County filed Aug. 28, 2009).

date, and (iii) Ontario has shown excusable neglect because, among other things, Ontario was not served with notice of the applicable bar date. As discussed more fully below, each of these arguments fail.

2. As a preliminary matter, Article 10.2 of the Modified Plan governs requests for payment of claims arising through June 1, 2009 and provides that "[a]ny request for payment of an Administrative Claim pursuant to this Article 10.2 that is not timely filed and served shall be disallowed automatically without the need for any objection from the Debtors or the Reorganized Debtors." (Modified Plan Art. 10.2 (emphasis added).)<sup>3</sup> Ontario conveniently omits this portion of the Modified Plan in its argument that the Reorganized Debtors are somehow barred from disallowing the Administrative Expense Claim as untimely. (See Motion ¶¶ 22-24.) Not only did the Reorganized Debtors "expressly reserve the right to amend, modify, or supplement [the] Forty-Third Omnibus Claims Objection" (Forty-Third Omnibus Claims Objection ¶ 58), but the Reorganized Debtors were not required to object to the Administrative Expense Claim as untimely because untimely administrative expense claims were automatically disallowed under the terms of the order approving the Modified Plan (Docket No. 18707). That the Reorganized Debtors followed the late claim protocol established by this Court—requiring Ontario to show "excusable neglect" before an untimely administrative expense claim is allowed—neither obviates the need for Ontario to establish excusable neglect nor requires the Reorganized Debtors to have previously objected to the Administrative Expense Claim on the grounds that such claim was untimely filed.

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<sup>3</sup> As discussed below, the Administrative Expense Claim is governed by Article 10.2 of the Modified Plan, not Article 10.5 of the Modified Plan, but at any rate, both provisions include the same language automatically disallowing untimely claims without the need for any objection from the Reorganized Debtors.



3. Ontario admitted in the first paragraph of its response to the Forty-Third Omnibus Claims Objection (Docket No. 19426) (the "Response") that all acts giving rise to the Administrative Expense Claim occurred prior to June 1, 2009,<sup>4</sup> but now asserts that its Administrative Expense Claim did not become "ripe" until September 10, 2009.<sup>5</sup> (Motion ¶¶ 20-21.) Having previously asserted that its Administrative Expense Claim arose prior to June 1, 2009, Ontario is estopped from backing away from this statement solely to fit its excusable neglect theory. Indeed, to determine "when a claim arises," courts focus on "the time when the acts giving rise to the alleged liability were performed." In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 892 (Bankr. S.D.N.Y. 1993) (citation omitted). Despite its claim arising at the very latest in May 2009, Ontario did not file its Administrative Expense Claim until October 30, 2009, after the Effective Date of the Modified Plan and almost four months after the July 15, 2009 bar date applicable to administrative expense claims that arose prior to June 1, 2009 (the "Initial Administrative Claim Bar Date").

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<sup>4</sup> Specifically, paragraph 1 of the Response notes that the Administrative Expense Claim "reflected a total amount due of \$288,751.25 in relation to demolition and related services provided to Debtors beginning on or about August 4, 2008 and continuing through May 2009." (Response ¶ 1 (emphasis added).)

<sup>5</sup> Ontario also lists that its debts were incurred between August 2008 and May 2009 on the face of proof of administrative expense claim number 19873. As discussed below, all acts that could give rise to Ontario's claim occurred before June 1, 2009. To the extent Ontario wishes to assert acts that occurred after June 1, 2009, such assertion would be an improper amendment to its proof of administrative expense claim and would not be recognized pursuant to Article 9.6(d) of the Modified Plan, which provides:

Any claim (whether a newly filed Claim or an amendment to a previously filed Claim) filed after the later of (i) the Effective Date, (ii) with respect to Claims for rejection damages, the bar date established pursuant to Article 8.3 of this Plan for the filing of such claims, (iii) with respect to Claims that are Administrative Claims, the bar date established pursuant to Articles 10.2 and 10.5 of this Plan, or (iv) with respect to Claims that are Prepetition Employee Related Obligations, the bar date established pursuant to Article 7.12(b) of this Plan, shall not be recognized, or recorded on the claims register, by the Claims Agent and shall be disallowed automatically without the need for any objection from the Debtors or the Reorganized Debtors unless such untimely filing is expressly authorized by an order of the Bankruptcy Court.

(Modified Plan Art. 9.6(d).)

4. Finally, despite Ontario's assertion that it has "no record of receiving any notice informing [it] of the Initial Administrative Claim Bar Date" (Motion ¶ 49), on or before June 20, 2009, the Debtors caused two copies of the Notice Of Bar Date For Filing Proofs Of Administrative Expense (the "June 2009 Notice") to be served on Ontario.<sup>6</sup> Specifically, the address to which copies of the June 2009 Notices were sent was the exact same business addresses listed on the relevant purchase order, which Ontario attached to its Administrative Expense Claim. Notwithstanding this ample and legally sufficient notice of the Initial Administrative Claim Bar Date, Ontario did not take any action to submit a timely proof of administrative expense claim. Ontario must therefore satisfy the excusable neglect standard outlined by the United States Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993), see id. at 387-95, and as applied by the United States Court of Appeals for the Second Circuit (the "Second Circuit"). See, e.g., Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. (In re Enron Corp.), 419 F.3d 115, 121-24 (2d Cir. 2005) (interpreting and applying Pioneer standard). However, Ontario offers no evidence that would excuse its late filing under the excusable neglect standard outlined in Pioneer. This Court should not permit Ontario to file a late Administrative Expense Claim and the Motion should be denied.

### **RELEVANT BACKGROUND**

#### **A. Ontario's Relationship With Delphi**

5. As described in paragraphs 7 to 9 of the Motion, Ontario entered into a business relationship with Delphi Automotive Systems LLC ("DAS LLC") on or about July 24, 2008. Ontario was to provide certain demolition services with respect to Delphi's Die Casting

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<sup>6</sup> See Affidavit Of Service Of Evan Gershbein For Solicitation Materials Served On Or Before June 20, 2009, dated June 23, 2009 (Docket No. 17267), the relevant portions of which are attached hereto as **Exhibit A**.

Building, located at 891 Driving Park Avenue and 1000 Lexington Avenue in Rochester, New York for the total amount of \$1.00 (the "Project"), with the further promise that Ontario would pay the Debtors a total amount of \$271,033.00 for the unconditional right to sell all scrap metal recovered, as set forth on purchase order number 450751581 (the "Purchase Order"), attached hereto as Exhibit B. The Project was to be completed by December 15, 2008.

6. Ontario further elaborated on its relationship with the Debtors in its Response as well as its answer and counterclaims filed in connection with the Contract Action (the "Answer"), which Ontario attached to the Administrative Expense Claim as well as to its Response. The Answer is attached hereto as Exhibit C.

7. On November 3, 2008, Ontario notified the Debtors about the declining scrap metal market (Answer ¶ 40) and by approximately November 18, 2008, Ontario began selling scrap metal for a purported loss. (Answer ¶ 35.) Throughout late 2008 and early 2009, Ontario sought to adjust the Project on account of "additional asbestos abatement" and the existing state of the scrap market. (Answer ¶¶ 42 -50.)

8. On May 11, 2009, the Debtors responded to Ontario's request for modifications to the Purchase Order, under which Delphi conditionally offered to extend the completion date to November 30, 2009.

9. On May 27, 2009, Ontario rejected the Debtors' offer to extend the completion date stating that "the project work is substantially complete." A copy of Ontario's May 27, 2009 rejection letter (the "Rejection Letter"), which Ontario attached to the Administrative Expense Claim as well as to its Response, is attached hereto as Exhibit D.

**B. Bar Date For Claims Under 11 U.S.C. § 503(b) Arising Through June 1, 2009**

10. On June 16, 2009, this Court entered the Modification Procedures Order which, among other things, established July 15, 2009 as the Initial Administrative Claim Bar

Date,<sup>7</sup> and included a form to be used to submit an administrative expense claim (an "Administrative Expense Claim Form").<sup>8</sup> Accordingly, paragraph 38 of the Modification Procedures Order provided that:

Any party that wishes to assert an administrative claim under 11 U.S.C. § 503(b) for the period from the commencement of these cases through June 1, 2009 shall file a proof of administrative expense (each, an "Administrative Expense Claim Form") for the purpose of asserting an administrative expense request, including any substantial contribution claims (each, an "Administrative Expense Claim" or "Claim") against any of the Debtors. July 15, 2009 at 5:00 p.m. prevailing Eastern time shall be the deadline for submitting all Administrative Expense Claims (the "Administrative Expense Bar Date") for the period from the commencement of these cases through June 1, 2009.

(Modification Procedures Order ¶ 38.) In addition, paragraph 41 of the Modification Procedures Order provides that:

Any party that is required but fails to file a timely Administrative Expense Claim Form shall be forever barred, estopped and enjoined from asserting such claim against the Debtors, and the Debtors and their property shall be forever discharged from any and all indebtedness, liability, or obligation with respect to such claim.

(Id. ¶ 41.)

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<sup>7</sup> The Initial Administrative Claim Bar Date was established pursuant to paragraph 38 of the Order (A)(I) Approving Modifications To Debtors' First Amended Plan Of Reorganization (As Modified) And Related Disclosures And Voting Procedures And (II) Setting Final Hearing Date To Consider Modifications To Confirmed First Amended Plan Of Reorganization And (B) Setting Administrative Expense Claims Bar Date And Alternative Transaction Hearing Date, entered by this Court on June 16, 2009 (Docket No. 17032) (the "Modification Procedures Order"). On July 15, 2009, this Court entered the Stipulation And Agreed Order Modifying Paragraph 38 Of Modification Procedures Order Establishing Administrative Expense Bar Date (Docket No. 18259) to provide that paragraph 38 of the Modification Procedures Order should be amended to require parties to submit an Administrative Expense Claim Form for Administrative Expense Claims for the period from the commencement of these cases through May 31, 2009 rather than through June 1, 2009.

<sup>8</sup> On June 20, 2009, in accordance with the Modification Procedures Order, the Debtors caused the claims and noticing agent in these chapter 11 cases, Kurtzman Carson Consultants LLC ("KCC"), and Financial Balloting Group LLC or their agents to transmit notices containing certain procedures for asserting an Administrative Expense Claim and a copy of the Administrative Expense Claim Form.

11. On or before June 20, 2009, the Debtors, through KCC, served Ontario with a copy of the June 2009 Notice by first class mail at the same address listed on the Purchase Order and each address listed below:

Ontario Specialty Contracting 333 Ganson St Buffalo, NY 14203	Ontario Specialty Contracting, Inc. 333 Ganson St Buffalo, NY 14203
---------------------------------------------------------------------	---------------------------------------------------------------------------

See Exhibit A.

12. The June 2009 Notice provides, in relevant part:

You must file an Administrative Expense Claim Form if you believe that you are entitled to an Administrative Expense Claim as described in 11 U.S.C. § 503, except as provided below.

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**ANY PARTY THAT IS REQUIRED BUT FAILS TO FILE AN ADMINISTRATIVE EXPENSE CLAIM FORM IN ACCORDANCE WITH THIS NOTICE ON OR BEFORE THE ADMINISTRATIVE EXPENSE BAR DATE SHALL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH CLAIM AGAINST THE DEBTORS AND REORGANIZED DEBTORS, AS APPLICABLE, AND THEIR PROPERTY SHALL BE FOREVER DISCHARGED FROM ANY AND ALL INDEBTEDNESS, LIABILITY, OR OBLIGATION WITH RESPECT TO SUCH CLAIM.**

(Docket No. 17267, Ex. J.)

**C. Substantial Consummation Of The Modified Plan.**

13. On July 30, 2009, this Court entered its Order Approving Modifications Under 11 U.S.C. § 1127(b) To (I) First Amended Joint Plan Of Reorganization Of Delphi Corporation And Certain Affiliates, Debtors And Debtors-In-Possession, As Modified And (II) Confirmation Order (Docket No. 12359) (Docket No. 18707) (the "Modification Approval Order"), which approved the Debtors' proposed modifications to their first amended joint plan of reorganization (the "Modified Plan").

14. On October 6, 2009 (the "Effective Date"), the Debtors substantially consummated the Modified Plan. The Reorganized Debtors have emerged from chapter 11 as DPH Holdings and affiliates and remain responsible for the post-Effective Date administration of these chapter 11 cases, including the disposition of certain retained assets, the payment of certain retained liabilities as provided for under the Modified Plan, and the eventual closing of the cases.

**D. Ontario's Untimely Administrative Expense Claim**

15. On October 30, 2009, Ontario filed its untimely administrative expense request under 11 U.S.C. § 503(b) in an amount not less than \$288,751.25, which was incurred between August 4, 2008 through May 2009. (Response ¶ 1.)

16. On January 22, 2010, the Reorganized Debtors filed their Forty-Third Omnibus Objection Pursuant To 11 U.S.C. § 503(b) And Fed. R. Bankr. P. 3007 To (I) Expunge Certain Administrative Expense (A) Severance Claims, (B) Books And Records Claims, (C) Duplicate Claims, (D) Equity Interests, (E) Prepetition Claims, (F) Insufficiently Documented Claims, (G) Pension, Benefit, And OPEB Claims, (H) Workers' Compensation Claims, And (I) Transferred Workers' Compensation Claims, (II) Modify And Allow Certain Administrative Expense Severance Claims, And (III) Allow Certain Administrative Expense Severance Claims (Docket No. 19356) (the "Forty-Third Omnibus Claims Objection"), which, among other things, objected to the Administrative Expense Claim on the basis that the claim was not reflected in the Reorganized Debtors' books and records.

17. Because the Administrative Expense Claim was untimely, the Reorganized Debtors filed a Notice Of Deadline To File Motion For Leave To File Late Administrative Expense Claim With Respect To Late Administrative Expense Claim Filed By Ontario Specialty Contracting Inc. (Administrative Expense Claim No. 19873) (Docket No. 21863) (the "Notice of Deadline") in accordance with the late claim procedures established by

this Court. The Notice of Deadline stated that if Ontario wished to further prosecute its Administrative Expense Claim, Ontario must file a motion by May 4, 2012.

**E. Filing Of The Ontario Motion**

18. On May 4, 2012, Ontario filed its Motion seeking a determination that the failure to timely file an Administrative Expense Claim was the result of excusable neglect and asking this Court to permit a late filed Administrative Expense Claim.

**ARGUMENT**

**I. ONTARIO RECEIVED ADEQUATE NOTICE OF THE APPLICABLE BAR DATE**

**A. All Amounts Asserted In The Administrative Expense Claim Arose Prior To June 1, 2009 And Ontario Is Estopped From Asserting Otherwise**

19. Contrary to Ontario's assertion in the Motion that its claim was not "ripe" until September 10, 2009, Ontario has acknowledged on numerous occasions, including in previous filings with this Court, that its alleged debts were incurred from August 2008 through May 2009. Specifically, Ontario admits that the acts giving rise to its Administrative Expense Claim occurred prior to June 1, 2009 (i) on the face of proof of administrative expense claim number 19873, (ii) in its Response, (iii) in the Rejection Letter, and (iv) in its Answer.

20. Having previously admitted that its Administrative Expense Claim arose prior to June 1, 2009, Ontario is estopped from backing away from its previous statements solely to fit its excusable neglect theory. See Zedner v. United States, 547 U.S. 489, 504 (2006) (stating that estoppel applies if a party's later position is clearly inconsistent with its earlier position); see also Shepardson ex rel. Shepardson v. Town of Schodack, 195 A.D.2d 630, 632, 599 N.Y.S.2d 700, 702 (3d Dep't 1993) (stating that estoppel applies "to prevent a party from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed

position in the same proceeding or a prior proceeding"), aff'd, 83 N.Y.2d 894, 636 N.E.2d 1383, 613 N.Y.S.2d 850 (1994).

21. Moreover, Ontario misuses the term "ripeness," which primarily refers to considerations designed to prevent "premature adjudication" of "abstract disagreements over administrative policies." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 772-33 (1998) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)). Instead, Ontario appears to use the term "ripeness" to indicate that its claim remained unmatured until after June 1, 2009. Therefore, Ontario argues, it did not need to file a proof of claim prior to the Initial Administrative Claim Bar Date. However, the Bankruptcy Code defines "claim" very broadly. See 11 U.S.C. § 101(5)(A) (a "claim" is, inter alia, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"); see also FCC v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 302 (2003) ("'[C]laim' has 'the broadest available definition . . .'" (citation omitted)). Given the Bankruptcy Code's broad definition of a claim, whether a claim is unmatured, unliquidated, or contingent is irrelevant to a creditor's obligation to file a proof of claim by the bar date. See, e.g., Woburn Assocs. V. Kahn (In re Hemingway Transp., Inc.), 954 F.2d 1, 9 (1st Cir. 1992) (whether or not a claim is "contingent, unliquidated, [or] unmatured . . . is immaterial to [a creditor's] obligation to file a timely proof of claim"). Instead, a creditor is obligated to file a proof of claim by the bar date if a claim has arisen in the time prescribed by the bar date order. When determining "when a claim arises," courts in this Circuit and elsewhere have focused "upon 'the time when the acts giving rise to the alleged liability were performed.'" Finley, Kumble, 160 B.R. at 892 (citations omitted). As Ontario indicated on the face of proof of administrative expense claim number 19873, all acts that gave rise to its claim occurred between



August 2008 and May 2009. Ontario was therefore required to file its claim by the Initial Administrative Claim Bar Date.

22. In addition, Ontario appears to assert that the Project was somehow extended to November 30, 2009, by a letter from the Debtors dated May 11, 2009. At best, the letter constituted an offer by the Debtors - an offer that was rejected by Ontario in its Rejection Letter as "unacceptable." (Rejection Letter ¶ 1.) In the Rejection Letter, Ontario proposed new terms of payment. (Rejection Letter ¶ 4.) Because Ontario explicitly rejected Delphi's offer and offered a counter-proposal, there was no valid extension of the Project. "[I]f [an] offeree responds [to an offer] by adding provisions or making a counter proposal, the offer is deemed rejected, rendering subsequent acceptance [of the offer] impossible." Kleinberg v. Ambassador Assocs., 103 A.D.2d 347, 348, 480 N.Y.S.2d 210, 211 (1st Dep't) (citations omitted), aff'd, 64 N.Y.2d 733, 475 N.E.2d 119, 485 N.Y.S.2d 748 (1984); see also Wittwer v. Hurwitz, 216 N.Y. 259, 264, 110 N.E. 433, 434 (1915) (where an offeree conditionally accepts an offer, the first offer is thereby rejected).

**B. The Reorganized Debtors Have Complied With The Modified Plan And Claims Procedures Established By This Court**

23. Because Ontario admits that its claims arose prior to June 1, 2009, it attempts to attack the Reorganized Debtors' Forty Third Omnibus Objection as untimely. To support this contention, Ontario cites to Article 10.5 of the Modified Plan. However, Article 10.2 of the Modified Plan governs Ontario's Administrative Expense Claim, which provides:

**10.2 Pre-Confirmation Administrative Claim Procedures.** Pursuant to the Modification Procedures Order, all requests for payment of an Administrative Claim through June 1, 2009 (other than claims under the DIP Facility or as set forth in the Modification Procedures Order, Article 10.1, or Article 10.3 of this Plan) must be filed with the Claims Agent and served on counsel for the Debtors and the Statutory Committees no later than the July 15, 2009. Any request for payment of an Administrative Claim pursuant to this Article 10.2 that is not timely filed and served shall be disallowed automatically without the need for any

objection from the Debtors or the Reorganized Debtors. The Debtors or the Reorganized Debtors may settle an Administrative Claim request made pursuant to this Article 10.2 without further Bankruptcy Court approval. Unless the Debtors or the Reorganized Debtors object to an Administrative Claim within 180 days after the Administrative Claims Bar Date (unless such objection period is extended by the Bankruptcy Court), such Administrative Claim shall be deemed allowed in the amount requested. In the event that the Debtors or the Reorganized Debtors object to an Administrative Claim, the Bankruptcy Court shall determine the allowed amount of such Administrative Claim.

(Modified Plan Art. 10.2 (emphasis added).)

24. Because the Administrative Expense Claim was not timely filed, the Reorganized Debtors were not required to object the claim as untimely.<sup>9</sup> Rather, once the Reorganized Debtors discovered that the Administrative Expense Claim was untimely filed, the Reorganized Debtors followed the late claim protocol established by this Court and filed the Notice of Deadline.<sup>10</sup> The burden is on Ontario to either show that the claim was timely filed and therefore not subject to Article 10.2 of the Modified Plan or establish excusable neglect. Ontario has not satisfied either burden.

**C. Ontario Received Adequate Notice Of The Initial Administrative Claim Bar Date**

25. In its Motion, Ontario disputes that it received the June 2009 Notice setting forth the Initial Administrative Claim Bar Date. Contrary to this assertion, a copy of the

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<sup>9</sup> The Reorganized Debtors were not required to object to untimely claims under either Article 10.2 or Article 10.5 of the Modified Plan. In paragraph 22 of the Motion, Ontario selectively omitted the following portion of Article 10.5: "Any request for payment of an Administrative Claim pursuant to this Article 10.5 that is not timely filed and served shall be disallowed automatically without the need for any objection from the Debtors or the Reorganized Debtors." (Modified Plan Art. 10.5 (emphasis added).)

<sup>10</sup> Although the Reorganized Debtors were not required to object the untimely Administrative Expense Claim, the Reorganized Debtors still objected to the claim pursuant to the Forty-Third Omnibus Claims Objection, which was filed on January 22, 2010, and was therefore filed within the 180-day deadline after the Effective Date as established by Article 10.2 the Modified Plan. Moreover, this Court specifically authorized the Debtors to utilize a broad "books and records" objection pursuant to the Order Under New Bankruptcy Rule 3007 And 11 U.S.C. § 105(a) Authorizing Debtors To Continue Claims Objection Procedures Under Order Dated December 7, 2006 Pursuant To 11 U.S.C. § 502(B) And Fed. R. Bankr. P. 2002(M), 3007, 7016, 7026, 9006, 9007, And 9014 Establishing (I) Dates For Hearings Regarding Objections To Claims And (II) Certain Notices And Procedures Governing Objections To Claims (Docket No 11561) ("Order Authorizing Continued Claims Objection Procedures").

June 2009 Notice was served at the same address identified on the Purchase Order. The Debtors' proper mailing of the June 2009 Notice constitutes effective service. Courts uniformly presume that an addressee receives a properly mailed item when the sender presents proof that it properly addressed, stamped, and deposited the item in the mail. See, e.g., Hagner v. United States, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed."); Leon v. Murphy, 988 F.2d 303, 309 (2d Cir. 1993) (finding, under New York law, that presumption of receipt arises when a sender presents "proof of the office procedure followed in a regular course of business, and these procedures establish that the required notice has been properly addressed and mailed" (citation omitted)); accord Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829-30, 386 N.E.2d 1085, 1086, 414 N.Y.S.2d 117, 118 (1978); see also In re R.H. Macy & Co., 161 B.R. 355, 359 (Bankr. S.D.N.Y. 1993) ("Mail properly addressed, stamped and deposited in the mail system is presumed to have been received by the party to whom it has been addressed."). Accordingly, the Debtors provided Ontario timely, proper, and sufficient service of the Notice.

26. Ontario was therefore obligated to file any administrative expense request for claims arising before June 1, 2009 by the applicable July 15, 2009 bar date, in accordance with the procedures referenced in the Modification Procedures Order and Modification Approval Order, or else it would be barred, estopped, and enjoined from asserting those claims against the Reorganized Debtors.

## **II. ONTARIO HAS FAILED TO MEET ITS BURDEN OF PROOF FOR ESTABLISHING EXCUSABLE NEGLECT**

27. Because Ontario received proper notice of the Initial Administrative Claim Bar Date, Ontario can obtain the relief requested in the Motion only if it meets its burden to

establish excusable neglect pursuant to Federal Rule of Bankruptcy Procedure 9006(b)(1). See R.H. Macy, 161 B.R. at 360 ("The burden of proving 'excusable neglect' is on the creditor seeking to extend the bar date."); see also In re Dana Corp., No. 06-10354 (BRL), 2007 WL 1577763, at \*3 (Bankr. S.D.N.Y. May 30, 2007) (finding that the "excusable neglect" analysis applies to administrative expense claims under 11 U.S.C § 503); In re DPH Holdings Corp., Hr'g Tr. at 44-45 (Bankr. S.D.N.Y. Aug. 20, 2009 ("given the practice of treating claims and disputes related to missed bar dates for administrative claims the same way as the courts treat missed bar dates for pre-petition claims, I find . . . those cases . . . to be appropriate here, and for all intents and purposes on all fours.")).<sup>11</sup>

28. Under Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993), courts must engage in a two-prong analysis. See Mich. Self-Insurers' Sec. Fund v. DPH Holdings Corp. (In re DPH Holdings Corp.), 434 B.R. 77, 82 & nn. 40-44 (S.D.N.Y. 2010) (citing Pioneer, 507 U.S. at 388, 395). First, a creditor must first show that its failure to file a timely claim was the result of "'neglect,' as opposed to willfulness or a knowing omission." Order Pursuant To 11 U.S.C. § 502(b) And Fed. R. Bankr. P. 3007 (I) Denying United States Of America's Motion For Leave To File Administrative Expense Claim And (II) Disallowing And Expunging Proof Of Claim Number 16727, at Ex. A p. 2 (Bankr. S.D.N.Y. Mar. 6, 2008) (Docket No. 12980) (citing Pioneer, 507 U.S. at 387-88), aff'd sub nom. United States v. Delphi Corp. (In re Delphi Corp.) Nos. 05-44481 (RDD), 08 Civ. 3753 (NRB), 2009 WL 803598 (S.D.N.Y. Mar. 24, 2009) (Docket No. 16515). Second, the creditor "must show by a preponderance of the evidence that the neglect was 'excusable.'" Id.

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<sup>11</sup> A copy of the relevant portion of the August 20, 2009 hearing transcript is attached hereto as Exhibit E.

29. Under the present circumstances, Ontario cannot satisfy even the first prong of the Pioneer test. Specifically, Ontario argues that the reason for the delay in filing its proof of administrative expense claim was that its claim was not "ripe" and Ontario was negotiating a mutual resolution with the Debtors. (Motion ¶ 48.) As discussed above, Ontario's assertion that its claim was not ripe is without merit. Assuming that Ontario did not file its claim because it was engaged in negotiations, then Ontario's failure to file a timely claim was the result of a willful or knowing omission—its decision to allow the bar date to pass in the hopes that it and the Debtors would reach a mutual resolution—as opposed to "neglect." The strategic decision to allow the Initial Administrative Claim Bar Date to pass therefore cannot support a claim of excusable neglect.

30. Even if Ontario were able to demonstrate that its failure to timely file an administrative expense claim was the result of neglect, Ontario has not met its burden for establishing that the neglect was "excusable" under the test outlined by the United States Supreme Court in Pioneer, 507 U.S. at 395. In examining whether a creditor's failure to file a claim by the bar date constituted excusable neglect, the Supreme Court found that the factors include "[a] the danger of prejudice to the debtor, [b] the length of the delay and its potential impact on judicial proceedings, [c] the reason for the delay, including whether it was within the reasonable control of the movant, and [d] whether the movant acted in good faith." Id. The Second Circuit has held the most important factor is ""the reason for the delay, including whether it was within the reasonable control of the movant."" Enron, 419 F.3d at 122-23 (citations omitted). In addition, the Second Circuit has adopted a "strict" standard in the area of excusable neglect. See Asbestos Pers. Injury Plaintiffs v. Travelers Indem. Co. (In re Johns Manville Corp.), 476 F.3d 118, 120, 124 (2d Cir. 2007).

31. "[T]he equities will rarely if ever favor a party who fail[s] to follow the clear dictates of a court rule,' and . . . 'where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test.'" Enron, 419 F.3d at 123 (second alteration in original; citation omitted). In this case, three factors—the reason for the delay, the prejudice to the Reorganized Debtors, and the length of the delay—weigh in favor of the debtors. Accordingly, Ontario fails to meet the excusable neglect standard and the Motion should be denied.

(i) Reason For The Delay

32. In the Second Circuit, the reason for the delay is the most important factor and is often dispositive. See Enron, 419 F.3d at 122-24; see also In re Musicland Holding Corp., 356 B.R. 603, 607-08 (Bankr. S.D.N.Y. 2006) (noting that the Second Circuit emphasizes "the reason for the delay" in determining excusable neglect, stating "[t]he other factors are relevant only in close cases") (citing Williams v. KFC Nat'l Mgmt. Co., 391 F.3d 411, 415-16 (2d Cir. 2004)).

33. Ontario argues that the reason for the delay in filing the Administrative Expense Claim was because its claim did not become "ripe" until after the Initial Administrative Claim Bar Date. (Motion ¶ 48.) To support its "ripeness" contention, Ontario cites two cases: In re Infiltrator Systems, Inc., 241 B.R. 278 (Bankr. D. Conn. 1999), and In re Hudson Oil Co., 100 B.R. 72 (Bankr. D. Kan. 1989). However, in both cases, the claimant did not learn of its alleged tort claim until after the bar date. In Infiltrator Systems, where the bar date had been specially sent to potential product liability claimants, the claimant, who had purchased the debtor's product, did not experience a "system failure" of the debtor's product until after the bar date. Infiltrator Sys., 241 B.R. at 280-81. Similarly, in Hudson Oil, an environmental liability case, the claimant, who had leased her property to the debtor, was not made aware of environmental damage to her

property until almost one year after the bar date. Hudson Oil, 100 B.R. at 73-76, 78. By contrast, Ontario was aware that it had a claim prior to the Initial Administrative Claim Bar Date, as evidenced by its Rejection Letter, where Ontario indicated it "[would] seek to recover the full claim." (Rejection Letter ¶ 4.) Moreover, in each case, the claimant filed its proof of claim before the court confirmed the debtor's plan of reorganization. See Infiltrator Sys., 241 B.R. at 281-82; Hudson Oil, 100 B.R. at 78. Here, however, Ontario filed its proof of claim after this Court approved and the Reorganized Debtors substantially consummated the Modified Plan.

34. Ontario also asserts that it failed to timely file its Administrative Claim because "Delphi offered, and the parties were considering, alternatives with regards to the equitable adjustment including extension of the work schedule under the Project . . . through November 30, 2009." (Motion ¶ 48.) In other words, Ontario appears to concede that the reason for its delay in filing its proof of administrative expense claim was the result of a strategic decision to continue to attempt to negotiate a resolution with the Debtors rather than filing a claim by the bar date. The Reorganized Debtors are not aware of, and Ontario does not cite, a single case that holds that a claim is not "ripe" until negotiations to resolve a breach that has allegedly occurred have ceased. In fact, Ontario may not properly base its argument regarding the reason for its delay on continued good-faith negotiations with the debtor, because good faith negotiations could have taken place after filing a proof of claim by the appropriate bar date. See In re Northwest Airlines Corp., No. 05-17930 (ALG), 2007 WL 498285, at \*3 (Bankr. S.D.N.Y. Feb. 9, 2007) (where a creditor failed to timely file an objection to a claim transfer, the creditor could not "properly ground its excusable neglect argument on the fact that it conducted an investigation and tried to resolve the issue by good-faith negotiations"; investigations and negotiations can all "be done after a filing is first made and rights are preserved").

35. The Second Circuit has held that the reason for the delay, including whether it was in the reasonable control of the movant, is the most important factor under the Pioneer analysis. See Enron, 419 F.3d at 122-24. Notably, when Ontario did file the Administrative Expense Claim months later, it was (a) based on a purchase order that Ontario had in its possession since July 2008, (b) a project that was supposed to be completed by December 15, 2008, and (c) pricing adjustments that were disputed from August 2008 through May 2009. Thus, Ontario apparently had all the information included in its untimely proof of administrative expense claim by May 2009, well in advance of the Initial Administrative Claim Bar Date. Ontario's proffered reason for the delay, therefore, not only shows that the reason for Ontario's delay in filings its claim was not due to neglect but also that the reason for the delay was entirely within its control.

36. Given that the courts in the Second Circuit "have 'taken a hard line' in applying the Pioneer test," Enron, 419 F.3d at 122 (quoting Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003)), and focus on ""the reason for the delay, including whether it was within the reasonable control of the movant,"" Enron, 419 F.3d at 122-23 (quoting Silivanch, 333 F.3d at 366 (quoting Pioneer, 507 U.S. at 395)), this factor weighs heavily in favor of the Reorganized Debtors.

(ii) Danger Of Prejudice To The Debtor

37. Allowing Ontario to file a late claim more than two and a half years after the consummation of the Modified Plan will prejudice the Reorganized Debtors as well as other creditors in these cases who filed timely administrative expense claims. Ontario appears to argue that the Reorganized Debtors have somehow acted in bad faith in their objection to the untimely Administrative Expense Claims, and this should be weighed against any danger of prejudice. To support this contention, Ontario cites two cases: In re Robinson Foundry, Inc., 347 B.R. 781



(Bankr. M.D. Ala. 2006), and In re Spring Ford Indus., Inc., No. 02-15015DWS, 2003 WL 21785960 (Bankr. E.D. Pa. July 25, 2003). As cited, neither case applies to Ontario's situation. In Robinson Foundry, the court, in dicta, cautioned that the "debtors should use the utmost care and precision when completing their schedules" and alluded to the idea that misrepresentations in schedules could be an act of bad faith on the part of the debtors. Robinson Foundry, 347 B.R. at 782-83 n.1. However, Ontario does not allege that the Debtors deliberately misrepresented their debts in their schedules. In Spring Ford Industries, the claimants were known creditors that did not receive actual notice of the bar date. The court held that the debtor's failure to provide effective notice was an omission of the debtor that excused a late filing. See Spring Ford Indus., 2003 WL 21785960, at \*1-3. In this case, Ontario did receive proper notice of the Initial Administrative Claims Bar Date as evidenced by the Affidavit Of Service Of Evan Gershbein For Solicitation Materials Served On Or Before June 20, 2009, dated June 23, 2009 (Docket No. 17267), attached hereto as Exhibit A. Moreover, the court considered the fact that the claim was filed before the effective date of the plan of reorganization as a relevant fact when weighing the danger of prejudice to the debtors. 2003 WL 21785960, at \*4. Contrary to Spring Ford Industries, Ontario received notice of the Initial Administrative Claims Bar Date, but waited until after the Effective Date to file its proof of administrative expense claim. Accordingly, neither case is applicable to Ontario's situation.

38. Allowing untimely claims at this time may open the floodgates to any potential claimant who failed to file an administrative expense claim on or before the applicable administrative claim bar date. Courts often have recognized the danger of opening the floodgates to potential claimants. See, e.g., Enron, 419 F.3d at 132 n.2 ("[C]ourts in this and other Circuits regularly cite the potential 'flood' of similar claims as a basis for rejecting late-filed claims."); In re Kmart Corp., 381 F.3d 709, 714 (7th Cir. 2004) (noting that "if the bankruptcy

court allowed all [similar] late-filed claims . . . , Kmart could easily find itself faced with a mountain of such claims"); In re Enron Creditors Recovery Corp., 370 B.R. 90, 103 (Bankr. S.D.N.Y. 2007) ("[I]t can be presumed in a case of this size with tens of thousands of filed claims, there are other similarly-situated potential claimants. . . . Any deluge of motions seeking similar relief would prejudice the Debtors' reorganization process." (omission in original; citation omitted)); Dana Corp., 2007 WL 1577763, at \*6 (denying motion to file late claim because, inter alia, "the floodgates argument is a viable one"). Accordingly, Ontario's argument that its claim of not less than \$288,751.25 does not prejudice the Reorganized Debtors because the "[t]he Debtors' bankruptcy, with its sheer size and hundreds of millions of dollars at issue [will not be prejudiced]" is without merit. (Motion ¶ 57.)

39. The Initial Administrative Claim Bar Date was established to identify administrative expense claims that would be paid pursuant to the terms of the Modified Plan. Allowing Ontario to prevail on the Motion may inspire many other similarly situated potential claimants to file similar motions. Accordingly, establishing a precedent for allowing untimely claims without a compelling justification would greatly prejudice the Reorganized Debtors, their estates, and their creditors and undermine the Debtors' restructuring efforts.

(iii) Length Of The Delay

40. Finally, the length of the delay also favors denying Ontario's Motion. Ontario failed to file a proof of administrative expense claim until after the Effective Date and nearly four months after the Initial Administrative Claims Bar Date. Yet, Ontario attempts to characterize its delay as a "insignificant." (Motion ¶ 61.) However, Courts considering excusable neglect in this jurisdiction have characterized delays of six months as "not excusable." Dana Corp., 2007 WL 1577763, at \*5; see also id. (delay of more than six months after bar date "was 'substantial'" (quoting Enron, 419 F.3d at 125)). Indeed, a delay of only one day may be

inexcusable. See In re Singer Co., No. M-47 (MBM), 2002 WL 10452, at \*3 (S.D.N.Y. Jan. 3, 2002) ("Although the Union's miscalculation as to the appropriate appeals deadline was in good faith and resulted in only one day's delay, not every minor error can or should be excused. Compliance with deadlines is not a game of horseshoes; close doesn't count."). In addition, this Court has disallowed the claims of similarly situated claimants for significantly shorter delays. See, e.g., Order Pursuant To 11 U.S.C. § 503(b) And Fed. R. Bankr. P. 3007 (I) Denying Plymouth Rubber Company LLC's Motion For Leave To File Late Claim And (II) Disallowing And Expunging Proof Of Claim Number 19506 (Docket No. 18849) (denying a late claim filed 15 days after the Initial Administrative Claims Bar Date); see also Order Pursuant To 11 U.S.C. § 503(b) And Fed. R. Bankr. P. 3007 (I) Denying The Motion Of Tal-Port Industries, LLC For Allowance Of An Administrative Claim Pursuant To 11 U.S.C. § 503(B)(1)(A) And, In The Alternative, For Leave To File A Late Administrative Expense Claim Pursuant To Bankruptcy Rule 9006(B) And (II) Disallowing And Expunging Proof Of Administrative Expense Claim Number 19804 (Docket No. 21259) (disallowing a claim as untimely when filed three months after the Initial Administrative Claims Bar Date and objected to on the Forty-Third Omnibus Claims Objection's "books and records" exhibit). Accordingly, this factor also weighs in favor of the Reorganized Debtors and further supports denying the Motion.

#### Conclusion

41. Ontario has failed to provide any evidence of circumstances justifying the extraordinary relief it seeks under the excusable neglect standard established by Pioneer and has not met its burden for establishing excusable neglect. The Motion should, therefore, be denied, and the untimely Administrative Expense Claim should be disallowed and expunged.

WHEREFORE the Reorganized Debtors respectfully request that this Court enter an order (a) denying the Motion, and (b) granting them such other and further relief as is just.

Dated: New York, New York  
May 17, 2012

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

By: /s/ John K. Lyons  
John Wm. Butler, Jr.  
John K. Lyons  
Ron E. Meisler  
155 North Wacker Drive  
Chicago, Illinois 60606  
(312) 407-0700

- and -

Four Times Square  
New York, New York 10036  
(212) 735-3000

Attorneys for DPH Holdings Corp., et al.,  
Reorganized Debtors

# **Exhibit A**

IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	X	
	:	
In re	:	Chapter 11
	:	
DELPHI CORPORATION, <u>et al.</u> ,	:	Case No. 05-44481 (RDD)
	:	
Debtors.	:	(Jointly Administered)
	:	
-----	X	

AFFIDAVIT OF SERVICE

I, Evan Gershbein, being duly sworn according to law, depose and say that I am employed by Kurtzman Carson Consultants LLC, the Court appointed claims and noticing agent for the Debtors in the above-captioned cases. I submit this Affidavit in connection with the service of the solicitation materials for the **First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession (As Modified)** [Docket No. 17030] (“the Plan”).

On December 1, 2005, the Court signed and entered an Order Pursuant to 28 U.S.C. § 156(c) Authorizing Retention and Appointment of Kurtzman Carson Consultants LLC as Claims, Noticing and Balloting Agent for Clerk of Bankruptcy Court [Docket No. 1374] designating KCC as the official Balloting Agent.

KCC is charged with the duty of printing and distributing Solicitation Packages to creditors and other interested parties pursuant to the instructions set forth in the **Order (A)(I) Approving Modifications to Debtors' First Amended Plan of Reorganization (as Modified) and Related Disclosures and Voting Procedures and (II) Setting Final Hearing Date to Consider Modifications to Confirmed First Amended Plan of Reorganization and (B) Setting Administrative Expense Claims Bar Date and Alternative Transaction Hearing Date ("Modification Procedures Order")** [Docket No. 17032] (“Modification Procedures Order”) as entered by the Court on June 16, 2009.

The various solicitation materials consist of the following documents:

- 1) Ballot for Accepting or Rejecting First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession (As Modified) (Class A Secured Claims) (“Class A Ballot”) (attached hereto as Exhibit A);
- 2) Ballot for Accepting or Rejecting First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession (As Modified) (Class C-1 General Unsecured Claims) (“Class C-1 Ballot”) (attached hereto as Exhibit B);

- 3) Ballot for Accepting or Rejecting First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession (As Modified) (Class C-2 Pension Benefit Guaranty Corporation Claims) (“Class C-2 Ballot”) (attached hereto as Exhibit C);
- 4) Ballot for Accepting or Rejecting First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession (As Modified) (Class D General Motors Corporation Claim) (“Class D Ballot”) (attached hereto as Exhibit D);
- 5) Notice of (1) Approval of Supplement; (2) Hearing on Modifications to Plan; (3) Deadline and Procedures for Filing Objections to Modifications of Plan; (4) Deadline and Procedures for Temporary Allowance of Certain Claims for Voting Purposes; (5) Treatment of Certain Unliquidated, Contingent, or Disputed Claims for Noticing, Voting, and Distribution Purposes; (6) Record Date; (7) Voting Deadline for Receipt of Ballots; and (9) Proposed Releases, Exculpation, and Injunction in Modified Plan (“Final Modification Hearing Notice”) (attached hereto as Exhibit E);
- 6) a letter from the Delphi Corporation Official Committee of Unsecured Creditors (“Creditors’ Committee Letter”) (attached hereto as Exhibit F);
- 7) First Amended Disclosure Statement Supplement with Respect to First Amended Plan of Reorganization (As Modified), Modification Procedures Order and December 10, 2007 Solicitation Procedures Order, in CD-ROM format (“CD-ROM”)
- 8) Notice of Non-Voting Status with Respect to Certain Claims and Interests (“Notice of Non-Voting Status”) (attached hereto as Exhibit G);
- 9) Notice to Unimpaired Creditors of (I) Filing of Proposed Modified Plan of Reorganization, (II) Treatment of Claims Under Modified Plan, (III) Hearing on Approval of Modified Plan, and (IV) Deadline and Procedures for Filing Objections Thereto (“Unimpaired Notice”) (attached hereto as Exhibit H);
- 10) a memorandum from Kurtzman Carson Consultants to additional notice parties of ballot recipients (“Ballot Notice Party Memo”) (attached hereto as Exhibit I);
- 11) Notice of Bar Date for Filing Proofs of Administrative Expense (“Administrative Bar Date Notice”) (attached hereto as Exhibit J); and
- 12) Administrative Expense Claim Form (“Administrative Expense Claim Form”) (attached hereto as Exhibit K).

On or before June 20, 2009, I caused to be served a personalized Class A Ballot, Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Administrative Bar Date Notice, Administrative Expense Claim Form and a pre-addressed, postage pre-paid return envelope upon the parties listed on Exhibit L via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served a personalized Class C-1 Ballot, Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Administrative Bar Date Notice, Administrative Expense Claim Form and a pre-addressed, postage pre-paid return envelope upon the parties listed on Exhibit M via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served a personalized Class C-2 Ballot, Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Administrative Bar Date Notice, Administrative Expense Claim Form and a pre-addressed, postage pre-paid return envelope upon the party listed on Exhibit N via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served a personalized Class D Ballot, Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Administrative Bar Date Notice, Administrative Expense Claim Form and a pre-addressed, postage pre-paid return envelope upon the party listed on Exhibit O via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served the Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Administrative Bar Date Notice and Administrative Expense Claim Form upon the parties listed on Exhibit P via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served the Final Modification Hearing Notice, Notice of Non-Voting Status, Administrative Bar Date Notice and Administrative Expense Claim Form upon the parties listed on Exhibit Q via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served the Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Unimpaired Notice, Administrative Bar Date Notice and Administrative Expense Claim Form upon the parties listed on Exhibit R via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served the Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Notice of Non-Voting Status, Administrative Bar Date Notice and Administrative Expense Claim Form upon the parties listed on Exhibit S via postage pre-paid U.S. mail.

On or before June 20, 2009, I caused to be served the Final Modification Hearing Notice, Creditors' Committee Letter, CD-ROM, Ballot Notice Party Memo, Administrative Bar Date Notice and Administrative Expense Claim Form upon the parties listed on Exhibit T via postage pre-paid U.S. mail.



On or before June 20, 2009, I caused to be served the Final Modification Hearing Notice, Administrative Bar Date Notice and Administrative Expense Claim Form upon the parties listed on Exhibit U via postage pre-paid U.S. mail.

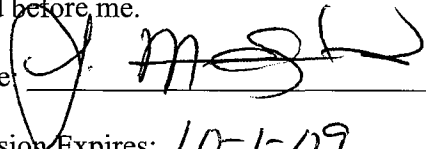
Dated: June 23, 2009

  
Evan Gershbein

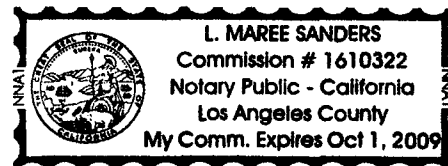
State of California  
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 23rd day of June, 2009, by Evan Gershbein, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature



Commission Expires: 10-1-09



# **EXHIBIT U**

Page 3092 of 4538

## **Exhibit B**

# DELPHI

Energy & Chassis Systems

Page 1 of 6

<b>Buyer:</b>
DELPHI AUTOMOTIVE SYSTEMS LLC DELPHI ENERGY & CHASSIS DIV 3000 University Drive Auburn Hills MI 48326

<b>Deliver to:</b>
DELPHI ENERGY & CHASSIS SYSTEMS ROCHESTER OPER-INIC DOCK 87/88/89 -7AM-3PM 1000 LEXINGTON AVE ROCHESTER NY 14606

ONTARIO SPECIALTY CONTRACTING 333 GANSON ST BUFFALO NY 14203-3062
-------------------------------------------------------------------------

Purchase Order	
PO Number 450751581	Date Issued 24-Jul-2008
Version 24-Jul-2008 12:22:27	

Delivery date: 01-DEC-2008
----------------------------

Vendor No: 1033101
DUNS No: 178523494

<b>Payment Terms:</b> ZMN3	<b>Currency:</b> USD
Payment settled on 2nd day of 3rd Month	
<b>Incoterms:</b> FOB- Freight Collect	

Item No.	Material No/Item Identifier No	Total Order Quantity	Plant	Requester	
Description					
00010	PR13390208 00010	1.000	E401 DELPHI	E & C	ROCHESTER
DECOMMISSIONING & DEMOLITION OF DIE R.RANDAZZO					
CASTING BUILDING PER DELPHI SPECIFICATION PE-1386 AND INQUIRY 2008-HM66. GENERAL TERMS & CONDITIONS FOR OUTSIDE CONTRACTS SHALL APPLY. SUPPLIER TO PAY DELPHI \$271,033.					
Delivery Date	Scheduled Quantity	Price	Price Unit	UOM	Value
01-DEC-2008	1.000	1.00	1	EA	1.00
Net Line Item Value					USD 1.00
Total net value				USD	1.00

<b>Purchasing Contact:</b> Martinez, Hugo <b>Phone:</b> 915 612-8775 <b>Fax:</b> 915 612-1146  Buyer Email: hugo.f.martinez@delphi.com	<b>Contact Address:</b> Buyer, Delphi Corporation Hernamos Escobar 5756, 32310 Juarez
Date and Time Printed: 24-Jul-2008 12:22:27	

**DELPHI**

Energy & Chassis Systems

Page 2 of 6

ONTARIO SPECIALTY CONTRACTING  
333 GANSON ST  
BUFFALO NY 14203-3062

**Purchase Order**

PO Number	Date Issued
450751581	24-Jul-2008
Version	
24-Jul-2008 12:22:27	

Item No.	Material No/Item Identifier No	Total Order Quantity	Plant
Description			Requester

**Notes:**

Purchase order is issued as per Ontario specialty response to RFQ No. 2008-HM-66 - Rochester Die Casting Building Demolition and subsequent responses to target price letters.

Ontario Specialty Contracting will pay Delphi the amount of \$271,033.00 usd under the following schedule:

25% (\$67,758.25) at issuance of work permits . start of physical work

25% (\$67,758.25) at start of structural Demolition

25% (\$67,758.25) at completion of Demolition

25% (\$67,758.25) at sign off of the work

\*\*\*\*\*

**IMPORTANT NOTICE TO SUPPLIERS:**

PLEASE COMPLY STRICTLY WITH DELPHI'S ENVIRONMENTAL REQUIREMENTS AS STATED IN THE ENVIRONMENTAL REQUIREMENTS FOR CONTRACTORS / SUPPLIERS / VENDORS. A COPY OF THE ENVIRONMENTAL REQUIREMENTS IS AVAILABLE UPON WRITTEN REQUEST TO THE BUYER.

\*\*\*\*\*

Delphi requires 100% on time delivery performance from suppliers. If you anticipate problems in delivering materials and/or completing services by the date specified on the Buyer's purchase order, the Delphi Buyer should be notified immediately.

\*\*\*\*\*

Restricted, toxic, and hazardous materials - Suppliers are required to comply with current governmental and safety constraints on restricted, toxic and hazardous materials; as well as environmental, electrical and electromagnetic considerations applicable to the country of manufacture and sale. This relates to both the salable product and the manufacturing processes. (Refer also to Terms and Conditions No. 8 "Ingredients Disclosure and Special Warnings Instructions").

Commencement of any work or service under this order shall constitute seller's acceptance of these responsibilities. If you do not accept these responsibilities, please contact the appropriate Delphi's Buyer.

\*\*\*\*\*

Seller acknowledges and agrees that Buyer's General Terms and Conditions and Delphi Customer Specific Requirements are incorporated in, and a part of, this contract and each purchase order, release, requisition, work order, shipping instruction, specification and other document issued by Buyer or accepted in writing by Buyer, whether expressed in written form or by electronic data interchange, relating to the goods and/or services to be provided by Seller pursuant to this contract (such documents are collectively referred to as this "Contract"). A copy of Buyer's General Terms and Conditions and Delphi Customer Specific Requirements are available upon written request to Buyer or via the internet at Delphi's website, delphi.com. Seller acknowledges and agrees that it has read and understands Buyer's General Terms and Conditions and Delphi Customer Specific Requirements . If Seller accepts this Contract in writing or commences any of the work or services which are the subject of this Contract, Seller will be deemed to have accepted this Contract and Buyer's General Terms and Conditions and Delphi Customer Specific Requirements in their entirety without modification. Any additions to, changes in, modifications of, or revisions of this Contract (including Buyer's General Terms and Conditions and Delphi Customer Specific Requirements ) which Seller proposes will be deemed to be rejected by Buyer except to the extent that Buyer expressly agrees to accept any such proposals in writing.

\*\*\*\*\*

**DELPHI**

Energy & Chassis Systems

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**Notes Continued:**

All wood packaging must be compliant with the International Standard Phytosanitary Measure #15 in the treatment of wood packaging material. Please reference the "Requirements for the treatment of wood packaging materials" section of the Supplier Community Portal found on [www.delphi.com](http://www.delphi.com) for further details.

\*\*\*\*\*  
\*\*\*\*\*  
\*\*\*\*\*

\*\*\*\*\*

Title to goods shall transfer from seller to buyer upon arrival at buyer's consuming plant.

\*\*\*\*\*

\*\*\*\*\*

If this is your first purchase order with Delphi under this DUNS number or your remittance information has changed, you need to establish a payment link with the following:

Delphi Corporation EAG Disbursements Center  
Vendor Name and Address Group  
PO Box 972930  
El Paso, Texas 79997-2930  
Fax 915-612-7152  
Attention: Vendor Master Group

Delphi Accounts Payable Help Desk Phone Number is (888)856 6779 or E-mail at [juarez.delphia.helpdesk@delphi.com](mailto:juarez.delphia.helpdesk@delphi.com).

You will need to provide a copy of invoice or letterhead showing, company name, correct remittance and correspondence addresses, contract number and "ship from" DUNS number.

You should have received an EFT Agreement from your buyer. But you can obtain a copy of the EFT Agreement forms at Website at [www.delphi.com](http://www.delphi.com) <<http://www.delphi.com>> Double Click on "Supplier Portal" in the bottom right of the screen, then click "HERE" under How to Become a Supplier. Then click on "Doing Business with Delphi" under Frequently Used Documents. Click on "Delphi Customer Specific Requirements". Scroll to the Payment Section. Then can Click on "EFT Payment Authorization Form" to download.

You can now view payment status on-line using e\*DELPHIPAY. For new users, the registration instructions are at <http://delphi.covisint.com> under the Registration tab. Please contact the Delphi Help Desk at 877-7DELPHI for any technical questions.

This order will pay on receipt. Please do not send an invoice unless specifically requested on the order. This is an invoice less system, which generates payment, based on receipt.

If this P.O. is in error, please advise the buyer listed below before shipping.

Payment issues and questions regarding shipped material should be directed to the Delphi Accounts Payable Help Desk at (877)349 3417.

**DELPHI**

Energy & Chassis Systems

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ONTARIO SPECIALTY CONTRACTING  
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Notes Continued:

\*\*\*\*\*

\*\*\*\*\*

Do not bill sales or use tax on items delivered to locations within the states listed below. Delphi Automotive Systems, LLC ("DELPHI") holds direct pay authority with these states. As a result, in all of the identified states DELPHI will remit directly to taxing authorities, all sales or use tax liability related to its purchase and use of tangible personal property and services. Therefore, effective immediately, this tax clause supersedes all tax code information found on this order except for those states not identified below. For those states not identified below, please continue to follow the specific tax code instructions found on this order. Listed below are Direct Pay Permit or Sales Tax License numbers for the eleven (11) states, or DELPHI locations within a state, where DELPHI holds direct pay authority:

Alabama -----805  
New Jersey -----383-431-131/000  
Georgia -----300-45870-8  
New York -----DP-3487  
Indiana -----1018702130011  
Ohio -----98-0002667  
Kansas -----98-0003a  
Texas -----1-38-3431131-1  
Michigan -----38-3431131  
Wisconsin -----WDP-99-01-010037  
Mississippi -----4375

If this order relates to a construction contract for real property, all applicable sales and use taxes are the responsibility of the contractor, and should be included in the contractor's bid as required pursuant to Section 7 of the DELPHI 1638 (8/00 Rev A), "Construction General Conditions", unless the responsibility for payment of sales & use taxes are otherwise specifically outlined in the contract.

Questions should be directed to: Delphi Disbursement - Customer Service Phone: (248) 874-4636

\*\*\*\*\*

\*\*\*\*\*

A PROPERLY COMPLETED CERTIFICATE OF ORIGIN,  
NAFTA CERTIFICATE WHERE APPLICABLE (CUSTOMS FORM 434)  
AND A MANUFACTURERS AFFIDAVIT STATING THE COUNTRY OF  
ORIGIN BE INCLUDED WITH THE SHIPPING DOCUMENTS FOR  
THE MATERIAL ON THIS PURCHASE ORDER. (NT)  
\*\*\*\*\*



**DELPHI**

Energy & Chassis Systems

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**Notes Continued:**

\*\*\*\*\*  
CERTIFICATE OF INSURANCE GENERAL

CONTRACTOR SHALL OBTAIN AND MAINTAIN CONSISTENT WITH THE PROVISIONS OF THIS CONTRACT, AT ITS SOLE EXPENSE, THE FOLLOWING TYPES OF INSURANCE COVERAGE, TO REMAIN IN FORCE DURING THE TERM OF THIS CONTRACT, WITH MINIMUM LIMITS AS SET FORTH BELOW:

1. COMMERCIAL GENERAL LIABILITY COVERING LIABILITY ARISING FROM PREMISES, OPERATIONS, INDEPENDENT CONTRACTORS, PRODUCTS - COMPLETED OPERATIONS, PERSONAL AND ADVERTISING INJURY, AND BLANKET CONTRACTUAL LIABILITY - US \$5,000,000 EACH OCCURRENCE.
2. BUSINESS AUTOMOBILE LIABILITY COVERING ALL OWNED, HIRED AND NON-OWNED VEHICLES - US \$5,000,000 EACH OCCURRENCE, INCLUDING ALL APPLICABLE STATUTORY COVERAGES.
3. WORKERS COMPENSATION - STATUTORY LIMITS FOR ALL STATES OF OPERATION.
4. EMPLOYERS LIABILITY - US \$1,000,000 EACH EMPLOYEE FOR BODILY INJURY BY ACCIDENT AND US \$1,000,000 EACH EMPLOYEE FOR BODILY INJURY BY DISEASE.
5. PROFESSIONAL/ERRORS AND OMISSIONS LIABILITY INSURANCE APPROPRIATE TO THE CONTRACTOR'S PROFESSION. COVERAGE SHOULD ALSO BE FOR A PROFESSIONAL ERROR, ACT OR OMISSION ARISING OUT OF THE SCOPE OF SERVICES SHOWN IN THIS CONTRACT - US \$1,000,000 PER OCCURRENCE (ONLY IF PERFORMING CONSULTING ALONG WITH ACTUAL SITE WORK, IF NO CONSULTING, THIS PROVISION CAN BE DELETED)

ALL POLICIES OF INSURANCE PROCURED BY CONTRACTOR HEREIN SHALL BE WRITTEN AS PRIMARY POLICIES; NOT CONTRIBUTING WITH OR IN EXCESS OF COVERAGE THAT DELPHI MAY CARRY. IF CONTRACTOR'S LIABILITY POLICIES DO NOT CONTAIN THE STANDARD SEPARATION OF INSURED'S PROVISION, OR A SUBSTANTIALLY SIMILAR CLAUSE, THEY SHALL BE ENDORSED TO PROVIDE CROSS-LIABILITY COVERAGE CONTRACTOR SHALL AGREE TO WAIVE THEIR INSURER'S RIGHT SUBROGATION UNDER ITS POLICIES. DELPHI SHALL BE AN ADDITIONAL INSURED UNDER CONTRACTOR'S INSURANCE POLICY (EXCEPT WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY), AND AT DELPHI'S REQUEST, CONTRACTOR SHALL PROVIDE DELPHI WITH A CERTIFICATE OF INSURANCE EVIDENCING COMPLIANCE WITH THE LIMITS, INSURANCE REQUIREMENTS AND WAIVER OF SUBROGATION SET FORTH ABOVE. SUCH CERTIFICATE SHALL BE IN A FORM ACCEPTABLE TO, AND UNDERWRITTEN BY AN INSURANCE COMPANY REASONABLY SATISFACTORY TO DELPHI AND WITH AN A.M.BEST COMPANY RATING OF A- OR ABOVE. BY REQUIRING INSURANCE HEREIN, DELPHI DOES NOT REPRESENT THAT COVERAGE AND LIMITS WILL NECESSARILY BE ADEQUATE TO PROTECT CONTRACTOR. THE PURCHASE OF APPROPRIATE INSURANCE COVERAGE BY CONTRACTOR OR THE FURNISHING OF A CERTIFICATE OF INSURANCE SHALL NOT RELEASE CONTRACTOR FROM ITS RESPECTIVE OBLIGATIONS OR LIABILITIES UNDER THE AGREEMENT.

MAIL ABOVE TO THE BUYER OF RECORD NOTED AT THE BOTTOM OF  
OF THE PURCHASING DOCUMENT.  
(FAX, PHONE AND ADDRESS BE PROVIDED)

**DELPHI**

Energy & Chassis Systems  
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**Notes Continued:**

CONTRACTORS ARE ADVISED THAT THEIR EMPLOYEES MAY HAVE  
THE POTENTIAL OF EXPOSURE TO WORKPLACE CHEMICALS.  
CONCERNS REGARDING THIS MATTER CAN BE DIRECTED TO  
DELPHI CORP ENGINEERING DEPT. CONTACT YOUR BUYER OF RECORD  
FOR A LOCAL CONTACT NUMBER.

\*\*\*\*\*

\*\*\*\*\*

Work described herein shall be performed in accordance with Delphi Corporation Construction General Conditions Delphi 1638 (including Insurance Coverages and Certification Requirements), provided with the initial request for quotation. Contractor Specifications and the safety rules and precautions are established by the Contracting Delphi Site's Safety Department.

\*\*\*\*\*

# **Exhibit C**

**STATE OF NEW YORK  
SUPREME COURT : ERIE COUNTY**

---

**DELPHI AUTOMOTIVE SYSTEMS, LLC**

**Plaintiff**

**v.**

**ANSWER WITH  
COUNTERCLAIMS**

**ONTARIO SPECIALTY CONTRACTING, INC.**

**Index No. I 2009010438**

**Defendant**

---

Defendant Ontario Specialty Contracting, Inc. ("OSC") by and through its counsel, DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, for its Answer with counterclaims to plaintiff Delphi Automotive Systems, LLC's ("Delphi") Complaint alleges as follows:

1. Denies the allegations of paragraphs 9, 10, 12, 14, 15, 16, 17, 20, 21, 22, 23, and 24 of the Complaint.
2. Admits the allegations of paragraphs 2, 4 and 18 of the Complaint.
3. Denies knowledge and information sufficient to admit or deny paragraph 1 of the Complaint at present.
4. As to paragraph 3 of the Complaint, admit that OSC did agree to provide certain demolition services at the request of Delphi and refer the Court to the specific terms of the contract and related bid documents between the parties for the terms of said agreement.
5. As to paragraphs 5, 6, 7 and 8 of the Complaint, OSC refers the Court to the specific terms of the identified communications for their content.
6. As to paragraph 11 of the Complaint, OSC admits that one of its subcontractors has filed a lien against the Demolition Project Property (on account of Delphi's breach of

contract) and otherwise deny the allegations of paragraph 11.

7. Paragraph 13 of the Complaint states a legal conclusion to which no response is required, and otherwise deny the allegations of paragraph 13.

8. As to paragraph 19 of the Complaint, OSC admits that it sold scrap metal recovered during the Demolition Project and denies that it received large sums of money for such scrap metals.

9. Denies any and all other allegations not specifically addressed above.

**FIRST DEFENSE & COUNTERCLAIM - BREACH OF CONTRACT**

10. Leading up to July 2008, Delphi issued several requests for quotations ("RFQ") for the demolition of its Rochester Die Casting Building (the "Project").

11. Each RFQ contained a target price calling for payment from the contractor to Delphi, on the basis that the value of the scrap metals at the Project site were believed to exceed the costs incurred by a contractor in performing the demolition work.

12. The RFQ forms established by Delphi, expressly required the contractor to identify the total amount of "material reclamation/savage value" credited to Delphi against the Project costs.

13. The "material reclamation/savage value" attributable to the scrap metals derived from the Project site was material to funding the demolition work on the Project.

14. Delphi repeatedly increased the target price as the scrap metal market increased.

15. On or about July 9, 2008, OSC responded to Delphi's final RFQ seeking a target price of "\$305,000 USD) or better proposal", with a response of (\$271,033). Attached hereto as **Exhibit A** is a copy of the OSC's July 7, 2008 response to Delphi's RFQ.

16. The line items within that response include a \$1,189,999 credit to Delphi for "material reclamation/savage value."

17. Based on asbestos disclosure documents provided to OSC by Delphi (which are required by New York law), OSC's response included a line item of \$35,265 in costs for asbestos abatement.

18. On or about July 24, 2008, Delphi issued a Purchase Order (the "Purchase Order") to OSC based on the above RFQ and accepting OSC's July 7, 2008 response. Attached hereto as **Exhibit B** is a true and correct copy of the Purchase Order, including General Terms and Conditions incorporated by reference.

19. Under the terms of the Purchase Order, OSC was to make four (4) separate progress payments to Delphi of \$67,758.25 each. OSC made the first payment of \$67,758.25 at or about the start of work on the Project.

20. The original project completion date under the Purchase Order was December 15, 2008.

21. Certain work, which included asbestos abatement and utility related work, was required to be completed prior to demolition of the physical structures on the Project site.

22. The scrap metals could not be removed from the physical structures on the Project site until the asbestos abatement and other pre-demolition work was completed.

23. OSC immediately mobilized and began pre-demolition work during the week of August 4, 2008.

24. The pre-demolition work was scheduled to complete on or before September 1, 2008.

25. Due to an error within the asbestos disclosure documents provided by Delphi, the pre-demolition asbestos abatement work on the Project went from a quantity of 1,600 s.f. to 15,600 s.f. of asbestos containing materials.

26. In other words, there was almost ten (10) times more asbestos containing materials on site than represented by Delphi.

27. Delphi has acknowledged this extra asbestos abatement work in writing and agreed to pay OSC at least \$42,000.00 for the performance of such work.

28. There was also extra pre-demolition utility work required on the Project.

29. Delphi has acknowledged this extra utility work in writing and agreed to pay OSC at least \$7,315.00 for the performance of such work.

30. Delphi is additionally liable for the delays, interference and impact costs resulting from this extra work.

31. As a result of the extra asbestos and utility work, and the time it took Delphi to address and respond to said issues, OSC's progress on the Project was delayed, interfered with and impacted.

32. As a result of the extra asbestos and utility work, and the time it took Delphi to address and respond to said issues, OSC was delayed in its ability to sell and remove the scrap metals from the Project site intended to fund the Project work.

33. During the period of Delphi's delays, the scrap metal market took an unprecedented and unanticipated decline from approximately \$460/ton at the start of the Project to a low of approximately \$80/ton.

34. On or about September 1, 2008, when OSC would have been able to sell and

establish dealer pricing arrangements for the Project under the original schedule, and thereafter begin immediate delivery of scrap metals, the market price under established scrap metal pricing indexes was \$405/ton.

35. By approximately November 18, 2008, when OSC was able to begin selling scrap metals on account of the above extras and delays, the market price under established scrap metal pricing indexes had dropped to only \$80/ton and many scrap dealers would not even place orders or take materials.

36. On account of the extra work directed by Delphi, interference and delays, OSC received at least \$424,708+/- less in revenue from the sale of scrap metals to fund the Project work.

37. The terms of the Purchase Order, provide at General Term and Condition number 3:

### 3. SPECIFICATION, DESIGN AND SCOP CHANGES

Buyer [Delphi] may at any time require Seller [OSC] to implement changes to the specifications or design of the goods or to the scope of any service or work covered by this Contract, including work related to inspection, testing or quality control. While Buyer [Delphi] will endeavor to discuss any such changes will Seller [OSC] as early as practical, Seller [OSC] will promptly implement such changes. *Buyer [Delphi] will equitably determine any adjustment in price or delivery schedules resulting from such changes*, including Buyer's [Delphi's] payment of reasonable costs of modifications to Seller's Equipment (as defined in Article 16) necessary to implement such changes. In order to assist in the determination of any equitable adjustment in price or delivery schedules, Seller [OSC] will, as requested, provide information to Buyer [Delphi], including documentation of changes in Seller's [OSC's] cost of production and the time to implement such changes. In the event of any disagreement arising out of such changes, Buyer [Delphi] and Seller [OSC] will work to resolve the disagreement in good faith, provided, however, that Seller [OSC] will continue performing under this Contract, including the manufacture and delivery of goods and prompt implementation of changes required by Buyer [Delphi], while Buyer [Delphi] and Seller [OSC] resolve any disagreement arising out of such changes.



Exhibit B (emphasis added).

38. In breach of the Purchase Order, Delphi has failed and refused to equitably adjust the contract price between the parties.

39. Although it has been acknowledged that additional pre-demolition work was directed by Delphi, it refused make adjustment to the contract price to account for the impact of such extra work and delays.

40. On or about November 3, 2008, as the pre-demolition work was coming to a close, OSC wrote to Delphi bringing the scrap metal market decline issues to Delphi's attention. OSC pointed out the delays attributable to Delphi, and sought an equitable adjustment of the contract price. Attached hereto as **Exhibit C** is a copy of a letter issued by OSC on or about November 3, 2008.

41. On or about December 3, 2008, OSC again wrote to Delphi on this subject. OSC and Delphi also had several verbal communications on this subject between November and December 2008, and thereafter. Delphi representatives, repeatedly assured OSC that an equitable adjustment of the contract price would be made.

42. On or about January 12, 2009, OSC again wrote to Delphi on this subject. Attached hereto as **Exhibit D** is a copy of OSC's January 12, 2009 letter.

43. On February 3, 2009, Delphi responded in writing stating, in essence, that it was discussing the matter internally and would get back to OSC shortly. OSC was expressly asked for its "patience and understanding." Attached hereto as **Exhibit E** is a copy of the February 3, 2009 email received from Delphi.

44. During the time period that Delphi was discussing this subject internally, OSC

continued its performance per Delphi's request.

45. On March 17, 2009, Delphi requested further information relating to the extra work that it required OSC to perform and asked OSC to "accept [its] apologies for the delay on the Delphi formal reply to your request to change the existing contract to the Rochester Die Cast demolition project." Attached hereto as **Exhibit F** is a copy of Delphi's March 17, 2009 email.

46. Meanwhile, Delphi continued to request that OSC continue performance and informally advised that an equitable adjustment would be forthcoming.

47. OSC provided the additional information requested by letter dated April 22, 2009. Attached hereto as **Exhibit G** is a copy of OSC's April 22, 2009 letter.

48. On May 7, 2009, Delphi sent an email stating that it would respond shortly. Attached hereto as **Exhibit H** is a copy of Delphi's May 7, 2009 email.

49. On May 11, 2009, Delphi responded. While offering additional time to allow the scrap metal market to recover, Delphi stated "Because Delphi itself is experiencing great financial difficulty, as a result of being in Chapter 11 since 2005 and due to current economic conditions, it is impossible for Delphi to commit any payments to Ontario Specialty Contracting." Attached hereto as **Exhibit I** is a copy of Delphi's May 11, 2009 letter.

50. By the time Delphi finally responded on May 11, 2009, substantially all of the scrap metals had been sold (in the depressed market) and, shortly thereafter, OSC was also substantially complete with the Project work.

51. The May 11, 2009 Delphi letter expressly acknowledges the extra asbestos and utility work directed by Delphi.

52. Delphi breached its contract with OSC.

53. OSC has been damaged as a result of Delphi's breach.

54. Delphi is liable to and should be directed to pay OSC monetary damages in an amount not less than \$288,751.25, plus interest.

**SECOND DEFENSE AND SECOND COUNTERCLAIM - QUANTUM MERUIT**

55. OSC repeats and realleges all prior allegations.

56. At the specific request of Delphi, OSC performed and provided labor, materials and demolition services to Delphi valued at not less than \$968,281.

57. Despite demand for payment, a balance of at least \$474,023 remains due and owing to OSC from Delphi.

58. Delphi is liable to and should be directed to pay OSC monetary damages in an amount not less than \$474,023, plus interest.

**THIRD DEFENSE AND THIRD COUNTERCLAIM - UNJUST ENRICHMENT**

59. OSC repeats and realleges all prior allegations.

60. At the specific request of Delphi, OSC performed and provided labor, materials and demolition services to Delphi valued at not less than \$968,281.

61. Despite demand for payment, a balance of at least \$474,023 remains due and owing to OSC from Delphi.

62. Delphi has been unjustly enriched at the expense of and to the detriment of OSC.

63. Equity and good conscience require that Delphi is liable to and should be directed to pay OSC monetary damages in an amount not less than \$474,023, plus interest.

**FOURTH DEFENSE**

64. Plaintiff's claims are barred by the doctrines of waiver, unclean hands and/or

equitable estoppel.

**FIFTH DEFENSE**

65. Plaintiff's claims are subject to an offset and/or set-off.

**SIXTH DEFENSE**

66. Plaintiff fails to state a cause of action.

**SEVENTH DEFENSE**

67. Plaintiff's breach of and conduct under the contract, served to discharge any obligations of OSC.

**EIGHTH DEFENSE**

68. Plaintiff's conduct with respect to the happening of the incident alleged in the Complaint constitutes culpable conduct, contributory negligence and/or assumption of risk, express or implied, attributable to plaintiff, which conduct contributed to the happening of the plaintiff's damages, if any.

69. The amount of damages, if any, otherwise recoverable by plaintiff shall be diminished in the proportion to which the culpable conduct attributable to plaintiff and to others, if any, for whose conduct this defendant is not responsible, bears to the culpable conduct which caused plaintiff's damages.

**NINTH DEFENSE**

70. Plaintiff lacks standing and/or jurisdiction to commence suit within the Supreme Court, Erie County.

**TENTH DEFENSE**

71. The Purchase Order is subject to rescission.

**ELEVENTH DEFENSE**

72. The plaintiff's claims are barred by the doctrine of unconscionability.

**WHEREFORE**, defendant requests judgment against plaintiff:

1. On its first counterclaim in an amount not less than \$288,751.25, plus interest;
2. On its second and third counterclaims in an amount not less than \$474,023, plus interest;
3. Dismissing plaintiff's Complaint;
4. Granting such other and further relief as this Court sees just and proper.

Dated: September 22, 2009

DUKE, HOLAMAN, PHOTIADIS  
& GRESENS LLP



Matthew J. Beck, Esq.

*Attorneys for Ontario Specialty Contracting, Inc.*  
1800 Main Place Tower  
350 Main Street  
Buffalo, New York 14202  
(716) 855-1111

# **Exhibit D**



Ontario Specialty Contracting, Inc.

Environmental Remediation || Demolition / Dismantlement

May 27, 2009

Hugo Martinez  
Delphi GSM - Construction

Re: Equitable Adjustment to Rochester Die Casting Building Demolition Contract

Dear Hugo:

I write in response to your letter of May 11, 2009. Delphi's offer is unacceptable. Please recall that Delphi expressly negotiated this contract on the premise that the scrap metals would fund approximately \$1.2M of the project costs and sought a credit for such materials. As the market increased, Delphi continuously demanded a larger scrap credit.


As your letter acknowledges, that scrap credit and source of project funding did not hold true, through no fault of Ontario Specialty Contracting ("OSC"), and turned this project completely upside down. OSC proceeded in good faith and in reliance on representations from Delphi that an adjustment would be forthcoming. Now that the project work is substantially complete, Delphi has refused adjustment and payment to OSC because "Delphi itself is experiencing great financial difficulty. . . ." That response is not palatable.

It is unconscionable to expect OSC to absorb a \$728,165 loss in project funding on account of the parties' mutually mistaken belief that the scrap metal market would not collapse, and therefore would serve as a substantial funding source for the demolition work. When the collapse occurred, the issue was immediately brought to Delphi's attention. OSC continued to perform in reliance on Delphi's conduct and representations, and both parties were hopeful that the market would recover. It did not.

We propose (without prejudice) that the parties equally absorb the loss of project funding in an effort to resolve this dispute. Under that scenario, Delphi owes OSC \$195,927.25, calculated as follows: (\$728,165 loss in funding X .5) - \$168,155.25 = \$195,927.25). In the absence of agreement, we will be forced to pursue legal proceedings and will seek to recover the full claim.

Please advise promptly as we have been carrying these costs for some time.

Very truly yours,

  
Peter Hartung  
Sr. Project Manager  
ONTARIO SPECIALTY CONTRACTING INC.

# **Exhibit E**



UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

- - - - -x

In the Matter of:

DELPHI CORPORATION, et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

August 20, 2009

10:20 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1 additional fact that would, I think, be implicated in the  
2 litigation in that one of the principal OEMs that received the  
3 CD players was General Motors, and General Motors waived a  
4 substantial portion of their warranty claims in connection with  
5 all the settlements that we had --

6 THE COURT: So that would --

7 MR. BUTLER: -- or dealt with.

8 THE COURT: -- that would greatly reduce the fifteen  
9 million in claims damages.

10 MR. BUTLER: Arguably, Your Honor, it would. I mean,  
11 you know, you'd get in -- I think you'd get into an argument  
12 about fungibility at the time, but that's what 9019 is designed  
13 for us to assess.

14 THE COURT: Right.

15 MR. BUTLER: And, ultimately, the judgment reached was  
16 this -- the settlements before Your Honor seem to be an  
17 appropriate disposition of this litigation under these  
18 circumstances.

19 THE COURT: Okay.

20 Does anyone have anything to say on this motion?

21 All right, for the reasons stated in the motion, I'll  
22 approve it as clearly a fair and reasonable settlement.

23 MR. BUTLER: Your Honor, matter number 7 on the agenda  
24 is the motion of Plymouth Rubber Company, LLC seeking to have  
25 an administrative claim that was filed fifteen days after the

1 bar date to be deemed timely filed, at docket number 18714.

2 And counsel's here to present the motion.

3 THE COURT: Okay.

4 MR. VINCEQUERRA: Good morning, Your Honor. James  
5 Vincequerra, Duane Morris, for Plymouth Rubber Company, LLC.

6 I'll explain in a minute why I'm emphasizing the LLC. With me  
7 today is Kara Zaleskas from my -- Duane Morris' Boston office.

8 As a matter of housekeeping, Your Honor, Ms. Zaleskas  
9 filed a pro hac vice motion approximately two weeks ago. I  
10 don't believe I saw the order on the docket yet. I would just  
11 ask, to the extent she is required to appear here --

12 THE COURT: That's fine. That's granted.

13 MR. VINCEQUERRA: Thank you very much, Your Honor. A  
14 number of -- a lot of trees were killed in the filings in  
15 connection with this matter. We raise no less than five issues  
16 as to why -- or reasons why our claim should be deemed timely  
17 or should otherwise be -- or the new admin claims bar date  
18 should not be deemed to apply to our claim.

19 I'm really going to focus here on two of the issues:  
20 the improper notice issue first and then, to the extent that  
21 Your Honor finds that the new bar date does apply to the claims  
22 of Plymouth Rubber Company, LLC, the excusable -- the  
23 components of excusable neglect.

24 I'll leave the balance of the arguments in our papers  
25 with regard to the technicalities of the amended admin bar

1 date, or the new admin bar date, the efficacy of that  
2 admitted -- or modification order and the informal notice to  
3 our papers. I think they're argued fairly clearly there.

4 THE COURT: The informal proof-of-claim argument?

5 MR. VINCEQUERRA: Yes, that's right.

6 THE COURT: Okay.

7 MR. VINCEQUERRA: I apologize. I'll leave those to my  
8 papers and reserve any statements on those for rebuttal to the  
9 extent we deem it's necessary.

10 As an initial matter, do you have any questions about  
11 the papers, Your Honor? I'd be happy to answer them.

12 THE COURT: Well, I've reviewed them, so -- I guess  
13 the issue on whether it's Inc. or LLC, to my mind, is -- it  
14 seems to me it's a non-issue because it was actually received  
15 by the claimant, right? It was received?

16 MR. VINCEQUERRA: It was received the day after the  
17 bar date.

18 THE COURT: Well, no, I mean it was received by the  
19 individual who forwarded it on.

20 MR. VINCEQUERRA: Well, really, the -- I mean, the  
21 point we're getting to is proper notice, I would imagine. And  
22 a couple of points. The debtor to points to 2002(g) and  
23 service on LLC first through the law firm Burns and Levinson  
24 and then at the former address of the Plymouth Rubber, Inc.  
25 entity. A couple of points here, Your Honor. Service was made

1 pursuant to outdated -- you know, an outdated claims --  
2 outdated exhibit-and-schedules lists and based on a claim that  
3 was filed by a different entity. Service was effected on  
4 counsel for a different entity. Burns and Levinson LLC, which  
5 makes up a bulk of the notice argument, never represented the  
6 LLC entity. I mean, and it's important to understand --

7 THE COURT: Was there any -- is there anything in the  
8 record about notice of Plymouth Rubber Company Inc.'s Chapter  
9 11 case and reorganization by --

10 MR. VINCEQUERRA: Delphi actively participated in that  
11 case, Your Honor.

12 THE COURT: How do I know that?

13 MR. VINCEQUERRA: Excuse me?

14 THE COURT: How do I know that? Or will they  
15 acknowledge that?

16 MR. VINCEQUERRA: Well, I can't imagine they won't  
17 acknowledge it, Your Honor, as they filed stipulations in that  
18 case as well as, I believe, a claim.

19 THE COURT: When did the plan confirm?

20 MR. VINCEQUERRA: Plymouth Rubber Inc. confirmed its  
21 plan and emerged from bankruptcy on August 31st, 2006. And  
22 maybe I should back up a little bit, Your Honor, and give you a  
23 little bit of a time line here because that may be helpful.

24 THE COURT: I mean, I know they sued LLC.

25 MR. VINCEQUERRA: That -- you know, that's the rub

1 here, Your Honor. They served the objection -- the notice of  
2 the new bar date on Inc. at seven different locations, or five  
3 different locations, wherever it -- however many it was, served  
4 counsel for Inc. Burns and Levinson has never represented the  
5 reorganized debtor, and -- but they got it right when they  
6 wanted to sue the new entity under the new purchase order.

7 THE COURT: But, again, Mr. Collins forwarded this  
8 notice on to LLC, right?

9 MR. VINCEQUERRA: Well, you're right, Your Honor,  
10 they --

11 THE COURT: And he was acting as LLC's agent, wasn't  
12 he?

13 MR. VINCEQUERRA: Right, as part of the wind-down  
14 staff. And if --

15 THE COURT: Okay.

16 MR. VINCEQUERRA: -- if Your Honor is -- you know,  
17 wants it moved forward to the excusable neglect argument, which  
18 I think is also a very good argument, I don't think the notice  
19 was proper there. I think, you know -- at footnote 3 of their  
20 objection is very telling. They note that for the purposes of  
21 their objection they presume that LLC is the successor-in-  
22 interest to Inc. I'm not aware of any case law that says you  
23 can get the benefit of that assumption for notice requirements  
24 under an --

25 THE COURT: But, again --

1 MR. VINCEQUERRA: -- under an admin --

2 THE COURT: -- Mr. Collins made the same presumption,  
3 right? He sent the notice on to LLC?

4 MR. VINCEQUERRA: He did send it on, there's -- we do  
5 not contest that fact.

6 THE COURT: Okay.

7 MR. VINCEQUERRA: So if you have no other questions  
8 for me on the proper notice -- we don't contest the fact that  
9 Mr. Collins did receive actual notice -- I can move on to  
10 excusable neglect.

11 THE COURT: Okay.

12 MR. VINCEQUERRA: Debtors don't contest two components  
13 of excusable neglect: They don't contest that the -- regarding  
14 the length of delay or Plymouth Rubber's good faith. So,  
15 really all that we're left with, Your Honor, is the prejudice  
16 requirement and the reason for delay.

17 Mr. Butler indicated that a proof of claim was filed  
18 fifteen or sixteen days after the bar date. That's technically  
19 true. We alerted -- well, we alerted counsel for the debtor  
20 the day after the bar date, asking them to deem the claim  
21 timely filed; that's reflected in Ms. Zaleskas' affidavit.

22 But to get to the point of excusable neglect, Your  
23 Honor, what happened here is really a perfect storm for my  
24 client. The prior entity, the Inc. entity, will have business  
25 relationships with Delphi as a result of the Delphi bankruptcy

1 and things that happened which, to be quite honest with you, my  
2 firm was not involved with. They went into bankruptcy and  
3 reorganized. When they emerged from bankruptcy, they had new  
4 equity, substantially new officers and directors, effectively a  
5 new entity; entered into a new purchase order agreement with  
6 Delphi on January 30th, 2008. About nine months after that,  
7 that's approximately a year and a half after, they emerged from  
8 bankrupt -- the reorganized debtor emerged from bankruptcy.

9 Approximately nine months after entry into that  
10 purchase order, Delphi sued Plymouth Rubber Company, LLC in  
11 Michigan for breach of the contract, for breach of the purchase  
12 order agreement. Plymouth Rubber Company, LLC counterclaimed,  
13 and that's the basis of our -- those are the bases of our --  
14 that's the basis of our admin claims.

15 Six days after Delphi sued Yongel (ph.) -- the Yongel  
16 Company, another -- a supplier of Plymouth Rubber Company also  
17 sued Plymouth Rubber Company, LLC. And in that case as well,  
18 Plymouth Rubber Company filed counterclaims both against Yongel  
19 and Delphi.

20 Both those cases were consolidated for mediation  
21 purposes and they're in global mediation. The -- as a result  
22 of the lawsuits from their principal buyer and their principal  
23 supplier, Plymouth Rubber Company, LLC started its own line  
24 down in October of 2008 and approximately three months after  
25 that laid off all of its employees. And that's where we have,



1 you know, the sole employee of the debtor, Mr. Collins.

2 So, you know, it's important to remember -- oh, let me  
3 jump -- I'm sorry, excuse me, Your Honor, let me jump to the  
4 portions of excusable neglect that are in dispute: reason for  
5 delay. We laid out some of these facts because, I mean,  
6 clearly there is a legitimate reason for Plymouth Rubber  
7 Company, LLC's one-day delay in providing notice to the debtors  
8 with regard to their admin claim.

9 THE COURT: I guess my one issue with that is why  
10 didn't Mr. Collins open the envelopes?

11 MR. VINCEQUERRA: Why did he open the envelopes?

12 THE COURT: Why didn't he?

13 MR. VINCEQUERRA: Why didn't he?

14 THE COURT: Right. I mean, he got them on the 9th.  
15 He put them -- it doesn't say this, but I guess one can infer  
16 that he didn't open them, he put them in another envelope and  
17 mailed them to Mr. -- it begins with an S, let me get the right  
18 name -- Mr. Schultz.

19 MR. VINCEQUERRA: Yes, that's right. His name is --

20 THE COURT: I don't understand why he didn't open the  
21 envelopes, because they weren't received by Mr. Schultz until  
22 six days later. I mean, particularly if he'd been waiting --  
23 if they'd been -- you know, if he only checks the P.O. box  
24 every two weeks, I don't understand why he wouldn't have opened  
25 the envelopes.

1 MR. VINCEQUERRA: Well, I mean, it's not in his  
2 papers, Your Honor, and anything I say would be pure, you know,  
3 suspicion and guesswork. But the fact of the matter is that  
4 the notices were not addressed to the entity that employed him.  
5 They were addressed to an Inc. -- the Inc. entity. So, LLC  
6 never filed a notice of appearance in this case, has never  
7 appeared in this case until this dispute, and they never felt  
8 that they had a need to appear in this case because they were  
9 party to a post-petition contract that, under the prior plan,  
10 gave them an allowed amended claim.

11 So, I mean, while it's pure, you know, circumspection  
12 as to why he did not open the letter for a day and put it in  
13 regular mail, the letter wasn't addressed to the entity that  
14 employed him and the entity that's in wind-down.

15 THE COURT: Well, it didn't employ Mr. Schultz either,  
16 did it?

17 MR. VINCEQUERRA: No, it did not. So, Your Honor, to  
18 continue on with reason for the delays, you know, there was an  
19 aggressive timetable here for the bar date, from the height of  
20 the holiday season. We're in -- Plymouth Rubber Company, LLC  
21 is in its own wind-down, is on a short staff, and I think that  
22 there's ample justification here for the reason of delay -- for  
23 the reason for delay.

24 To move to the other component that's in contest, as  
25 to prejudice, I don't see, you know, any realistic manner of

1 prejudice here for the debtors. They learned of the claim one  
2 day after the bar date. There's no contest that Ms. -- there's  
3 no question that Ms. Zaleskas -- I mean, it's not contested  
4 Ms. Zaleskas alerted the debtors to the claim the day after the  
5 bar date. The claim was filed a week and a half to two weeks  
6 later, followed shortly by this motion. The claim is an  
7 unliquidated amount, is in the nature of a counterclaim, you  
8 know, brought as a response to suits against Plymouth Rubber  
9 Company, LLC.

10 My understanding from my reading of the plan and  
11 disclosure statement in this case and some things in the news  
12 is admin claims are anticipated to be paid in full, and there  
13 are literally hundreds of millions of dollars of admin claims.

14 So I see very little chance for prejudice there. The  
15 debtors make the argument that -- you know, the classic  
16 floodgates argument that you commonly see in pioneer type of  
17 cases. The facts of this case are so unique I really don't see  
18 that as a reasonable prospect. Two creditors of the debtors  
19 with substantially similar names but different entities, you  
20 know, the claimant being in wind-down, I just don't see the  
21 floodgates opening here.

22 So with that, Your Honor, if you have no questions,  
23 I'll turn it over to, I guess -- is it Mr. Powlen?

24 MR. POWLEN: Yeah.

25 THE COURT: Is it -- was it a compulsory counterclaim?

1 Does it arise under the same transaction or occurrence?

2 MR. VINCEQUERRA: Rises under the same purchase order  
3 agreement.

4 THE COURT: Okay.

5 MR. VINCEQUERRA: Thank you very much, Your Honor.

6 MR. BUTLER: Judge, just one moment, if you don't  
7 mind.

8 (Pause)

9 MR. BUTLER: Your Honor, I just want to make sure the  
10 record is clear here. I have, and I think counsel will  
11 acknowledge that we obtained, and I have for the Court, a  
12 certification of conversion from a corporation to a limited  
13 liability company of Plymouth Rubber Company, Inc., a  
14 Massachusetts corporation. It's -- it is the same company. I  
15 mean, we hear that it's different companies and not successors.  
16 I actually have the documentation from the State of Delaware  
17 Secretary of State's Office that we obtained that shows that on  
18 September 1st, 2006 the same legal entity was converted from  
19 one kind of corporation in Delaware to another kind of  
20 corporation in Delaware.

21 So, I mean, I think the suggestion that these are  
22 fundamentally different entities just is not accurate. And  
23 I've got the evidence here. I don't think that counsel,  
24 Mr. Vincequerra, would dispute the Secretary of State of  
25 Delaware as to what the entity is, and I have that.

1 So this is the same legal entity that was converted on  
2 the -- on September 1st.

3 Second, Your Honor, Mr. Vincequerra, in his argument,  
4 made a major point about the fact that there was a new purchase  
5 order in January of 2008. And, in fact, there was a purchase  
6 order that was reissued on -- in January of 2008 after the 2006  
7 reorganization to Plymouth Rubber, and it was purchase order  
8 number P6850008, and it was issued to the address 500 Turnpike  
9 Street in Canton, Massachusetts. That was the business address  
10 that the parties New Plymouth, Plymouth LLC, whatever one wants  
11 to call it, that is the address that Plymouth used with Delphi  
12 in connection with the new purchase order that Mr. Vincequerra  
13 referred to, and the PO was issued to that address. And the  
14 notice of administrative claims bar date was -- one of the  
15 places that it went to was to that address in Canton.

16 And so I think that the -- you know, the argument that  
17 the notice, in addition to being actually received, it also was  
18 the business address that Delphi and Plymouth Rubber Company,  
19 LLC used between themselves in the January 2008 purchase order  
20 and was the appropriate business address.

21 I don't think, Your Honor, that this matter should  
22 turn in any respect on the issue of notice. Appropriate notice  
23 was given; it was given in connection with -- to the  
24 appropriate -- you know, the legal entity, which really was the  
25 same entity converted, to the business address that was used in

1 the 2008 contract between the companies. And the notice was  
2 actually, in fact, received.

3 I think the question is more the excusable neglect  
4 question here, and I only have a few comments on that. First,  
5 we acknowledged in our papers that we did receive a call from  
6 counsel the day after the bar date. That isn't unusual. We  
7 receive those kinds of calls fairly regularly when there are  
8 bar date issues, and our response is always the same, which is  
9 it's not our bar date to change, it's the Court's bar date, and  
10 that we don't have any ability to change the date and people  
11 need to take whatever steps they need to take to protect their  
12 clients. And the same kind of -- the same discussion was had  
13 with counsel for Plymouth Rubber.

14 The fact that they waited a couple of weeks -- and it  
15 wasn't just a week, it was the fact they waited until after the  
16 plan modification hearing to submit the proof of claim two  
17 weeks later, is -- you know, kind of mystifies me as to why  
18 they chose to do that. But that's not excusable neglect. They  
19 could have filed something the next day. According to  
20 Mr. Vincequerra's argument, it would have been -- you know, all  
21 they needed to do was to file an administrative claim that  
22 attached the lawsuit and that that would have done that.

23 I think when you look at the -- from the company's  
24 perspective, the issue here is -- Your Honor, I think, knows  
25 from the plan modification hearing and all of the pleadings

1 filed in connection with that, Delphi was on a mission over the  
2 last fifteen, sixteen months since the prior plan, before it  
3 was modified, hadn't gone effective, to try and develop a  
4 solution for these cases that would be successful, that would  
5 involve modifying the plan, emerging pursuant to a plan and  
6 providing for the payment of administrative expenses that are  
7 allowed. And that took an enormous amount of effort and  
8 negotiation to do that. And one of the things, the processes  
9 we went through in the latter part of July, was to assess all  
10 of the claims that were made in connection with the bar date  
11 and to evaluate those with our chief restructuring officer and  
12 with the representatives of our other major stakeholders,  
13 particularly with the -- some of the advisors of the DIP  
14 lenders in connection with their credit bid so that we were all  
15 comfortable in proceeding on the 29th here. And that was based  
16 on having an assessment of what the world of administrative  
17 claims was through July -- or through May 31st, understanding,  
18 as Your Honor knows, under the modified plan that's now been  
19 approved, the -- there's another window bar date that's going  
20 to go out covering June 1st through the anticipated effective  
21 date of September 30th.

22 But making the assessment of what the unpaid  
23 administrative claims were from the -- from October 5, 2005  
24 through May 31, 2008 was a real exercise in connection with  
25 preparing for the plan modification hearing. And the fact that

1 counsel or their client chose not to file the claim for a  
2 couple of weeks after they had actual notice and they had had  
3 actual conversations with us I don't think fits within the  
4 factors of excusable neglect.

5 That's all, Your Honor, the debtors would have to say  
6 on this.

7 THE COURT: Well, let me explore that a little bit  
8 more. Is there or was there an estimate of allowed  
9 administrative claims that was a factor in the DIP lenders and  
10 GM going forward on the 29th to propose the winning plan  
11 support agreement and lead to the modified confirmation --

12 MR. BUTLER: Yes, Your Honor. You --

13 THE COURT: -- of the plan? Because, I mean, I don't  
14 remember any testimony --

15 MR. BUTLER: No.

16 THE COURT: -- on, you know, some floor that -- or  
17 some ceiling for administrative claims or anything.

18 MR. BUTLER: No, there's not, Your Honor. There was  
19 not. What Your Honor may recall was that one of the charts  
20 that we put up and went through explained how the  
21 administrative liabilities were going to be allocated among the  
22 parties.

23 THE COURT: Right.

24 MR. BUTLER: It was intentional that -- and one of the  
25 things we fought for in the MDA was not to have dollar cap



1 limitations. There were, in fact -- that was a subject of  
2 protracted negotiation, actually, as to whether or not there  
3 would be limitations and what those liabilities would be and,  
4 instead, the agreement was to do it by category. And Your  
5 Honor saw those categories allocated between the GM entity, the  
6 DIPCo entity and DPH Holdings, the reorganized entity.

7 THE COURT: Right.

8 MR. BUTLER: And there was also a focus, and Your  
9 Honor may recall that Mr. Stipp, in his sworn testimony,  
10 provided in his declaration a fair amount of discussion about  
11 the assessment of administrative claims as it related to DPH  
12 Holdings' ability to be able to deal with its -- or what it  
13 needed to satisfy as it moved forward. And so there was an  
14 assessment that went on, there was -- Mr. Stipp did make those  
15 evaluations and make those assessment, and there was that, if  
16 you will, sort of informal feasibility discussion among the  
17 parties. Ultimately, that didn't arise to the level, Your  
18 Honor, of having -- beyond the sworn testimony, there wasn't  
19 any controversy at the plan modification hearing about it  
20 because ultimately it had been negotiated out.

21 THE COURT: So which of the three entities would be  
22 responsible for any affirmative recovery here?

23 MR. BUTLER: Without prejudicing the estate, because I  
24 may get this wrong, but my sense is that this is a retained  
25 liability of DPH Holdings. I don't know that this -- and the

1 reason I say that is because this supplier no longer does  
2 business with the company. This is a -- but I'd have to check  
3 that in terms of -- go back and check that under the plan in  
4 the negotiations. But this is a supplier -- this is a former  
5 supplier who, from the company's perspective, failed to live up  
6 to its obligations under the purchase order, and it required  
7 Delphi to incur a very substantial expense in re-sourcing from  
8 the supplier who failed to live up to the terms of their  
9 contract in the company. And that's only why we sued them, and  
10 we re-sourced the product.

11 So I think the re-sourced product and the  
12 administrative liabilities associated with them go to, in fact,  
13 DIPCo, but I think that the exposure under this litigation is  
14 likely a DPH Holding obligation. But I'd have to confirm that,  
15 Judge. That's my best recollection.

16 THE COURT: Okay. Well --

17 MR. BUTLER: And as you know, DPH Holdings --

18 THE COURT: It wouldn't be -- I guess it wouldn't be a  
19 GM one because this isn't a GM plant --

20 MR. BUTLER: No, it's not -- no, no, it's -- and  
21 that's what I'm saying to you. My -- and I think Ms. Kraft  
22 (ph.) is here from the company and we just told her about  
23 this -- my believe is the retained liability for the litigation  
24 exposure would be DPH Holdings. And the supplier contract for  
25 what was the re-sourced contract, which is with another entity,

1 that obligation and the administrative claims associated with  
2 it, that went to DIP Holdco, or will go to DIP Holdco.

3 THE COURT: Okay.

4 MR. BUTLER: I think that's the proper -- at least  
5 that was the philosophy behind the negotiation at the time.

6 THE COURT: All right. And it looks like to me the  
7 counterclaim -- you can correct if I'm wrong -- the  
8 counterclaim just seeks monetary damages, right? It doesn't  
9 seek specific performance or anything like that?

10 MR. BUTLER: That's correct.

11 THE COURT: It's an unliquidated claim. Have there  
12 been any discussion as to what the damages are asserted to be  
13 as far as the counterclaim? Either one of you --

14 MR. BUTLER: There was, Your Honor -- I'm advised, and  
15 Mr. Vincequerra may know, I was advised it was a mediation. I  
16 don't know what was --

17 THE COURT: Right.

18 MR. BUTLER: -- put on the table at the mediation.

19 THE COURT: I mean, I don't want you to reveal  
20 settlement proposals, but, just, has there been a settlement of  
21 what the damages could be?

22 MR. VINCEQUERRA: Yes, Your Honor, that's the irony of  
23 this whole thing for my client is that while this bar date  
24 procedure has been going on, my client has been across the  
25 table --

1 THE COURT: No, I know there's been a mediation. I'm  
2 just trying to figure out what --

3 MR. VINCEQUERRA: No, there have been -- you know, a  
4 mediation is fairly far along. There have been numbers  
5 exchanged.

6 THE COURT: I don't want to hear settlement proposals.  
7 What I'm focusing on here is, on the issue of prejudice, you  
8 had made a good point that these claims are going to be paid in  
9 full under the modified plan. The point I've just been  
10 exploring with Mr. Butler is who's going to be paying them. If  
11 it is, as it would appear to me to be the case just from the  
12 nature of the claim and the MDA, the remaining holding company,  
13 the debtor wind-down company, then I did make a conclusion as  
14 part of my ruling approving the modification of the plan that  
15 that modification was feasible, and that was premised upon the  
16 testimony about the likely amount of administrative claims and  
17 the funding of the successor entity and the like.

18 So the reason I'm asking this question is to find out  
19 how large your claim is. It wasn't taken into account in that  
20 testimony, and it was a large claim that may affect the  
21 prejudice calculation. I just don't know. I mean, it's an  
22 unliquidated claim. I don't know whether it's large or not but  
23 whether it's, you know, something that, for example, pales in  
24 comparison to the debtors' claim.

25 So I'm not asking you about settlement discussions;

1 I'm asking what's been asserted, unless you want to tell me  
2 what you think the realistic number is. But that's up to you.

3 MR. VINCEQUERRA: It's difficult to say , Your Honor,  
4 because, to be quite honest with you, I haven't been involved  
5 in the mediation. I understand from our mediation statement  
6 that that counterclaim number that we've been stuck at is  
7 roughly twenty million dollars. Again, that's as a  
8 counterclaim that would be, obviously, offset against any  
9 successful recovery that they have against us.

10 THE COURT: Although it would seem to be it's  
11 either/or, right? Unless you settle it, either they breached  
12 or you breached. So I'm not sure there'd be much of an offset.

13 Okay. All right.

14 MR. BUTLER: Your Honor, that's all the debtors  
15 have --

16 THE COURT: Well --

17 MR. BUTLER: -- unless you had a question.

18 THE COURT: -- let me ask you, though, based upon a  
19 twenty million dollar claim, how does that affect the -- was  
20 any liability for this taken into account in the declarations  
21 in support of the modification of the plan?

22 MR. BUTLER: My understanding is the answer to that  
23 question is no, there was no money allocated to this amount  
24 through the -- whether the claims process was evaluated.

25 The -- and, you know, Your Honor, there has been a

1 wide variety of lawsuits started, stopped in hiatus, since  
2 October of 2005. And the debtors relied on the administrative  
3 claims process here that went out to everybody as -- to catch  
4 the claims that people were going to assert as part of the --  
5 to understand as part of the plan modification process.

6 THE COURT: And, again, this claim came in after the  
7 plan modification hearing.

8 MR. BUTLER: Correct. It came in on the June 30 -- on  
9 July 30th --

10 THE COURT: The hearing was on the 29th.

11 MR. BUTLER: -- and where the hearing was July 29th.  
12 And the assessment was actually made in the days -- we spent  
13 three or four days leading up to the July 29th hearing going  
14 over this evaluation and assessment.

15 THE COURT: Okay.

16 MR. BUTLER: And I think -- you know, I don't have  
17 Mr. Stipp here, Your Honor, but Ms. Kraft is here and she works  
18 closely with Mr. Stipp. I think that Mr. Stipp would tell you  
19 that if he had an extra twenty million dollar -- if in fact,  
20 taking their -- I think we disagree vigorously with the claim,  
21 but if you add another twenty million dollars of litigation  
22 exposure to the pot, would that be material, I think Mr. Stipp  
23 would say yes, it's material.

24 THE COURT: Well, what was funding again for --

25 MR. BUTLER: Remember, the funding from -- I think it

1 was -- the entire funding from General Motors was fifty  
2 million; plus, we had the plants that were retained which we  
3 could sell off; plus, we had --

4 THE COURT: But those are more dogs and cats than --

5 MR. BUTLER: They were.

6 THE COURT: Right.

7 MR. BUTLER: Plus, we had the avoidance actions, to  
8 the extent that there's collectability on some of the avoidance  
9 actions. And there were some other -- there were some -- I  
10 think some other MRA payments, I think, from General Motors or  
11 a few other sources of revenue. But it was calibrated. It  
12 was -- you know, it was designed, as you know, to provide for  
13 an efficient disposition of all of those assets and remediation  
14 of the -- of some of the other issues and payment of the  
15 liabilities. So I think Mr. Stipp would argue that twenty  
16 million was material in that calculation.

17 THE COURT: Okay.

18 MR. BUTLER: Thanks, Judge.

19 THE COURT: Okay.

20 MR. POWLEN: Just one minor point, Your Honor.

21 Mr. Butler -- I don't know if he passed it up, because I didn't  
22 see him pass it up, but makes much of the fact that the  
23 entities -- the LLC entity and the Inc. entity are the same. I  
24 know Your Honor said actual -- there was -- you know, the  
25 notice was received, but they're the same entities. And I know

1 Mr. Butler's familiar with the concept of a fresh start and a  
2 reorganized debtor, but they're the same entities as they would  
3 be in any post-effective date debtor that has entirely new  
4 equity and has a fresh start in a bankruptcy. That this was  
5 not accomplished through a 363 sale and a transfer of assets  
6 but rather an infusion of equity and a stock deal doesn't  
7 change the fact that at the end of the day they were dealing  
8 with a newly born entity.

9 Other than that, Your Honor, I have nothing further.  
10 Thank you very much for your time.

11 THE COURT: Okay.

12 Is -- neither Mr. Collins nor Mr. Schultz is here,  
13 right?

14 MR. POWLEN: No, Your Honor.

15 THE COURT: They're not present?

16 MR. POWLEN: No, Your Honor. We had discussions with  
17 Skadden, and prior to the hearing we agreed that we would just  
18 rely on the affidavits.

19 THE COURT: Okay.

20 Okay, anyone else?

21 Okay, I have before me a motion by Plymouth Rubber  
22 Company, LLC for an order deeming its administrative expense  
23 claim timely filed or for related relief. The origin of this  
24 dispute is that, in connection with proceeding to obtain the  
25 modification and ultimate consummation of its confirmed but



1 unconsummated Chapter 11 plan, Delphi Corporation and its  
2 affiliated debtors sought approval of an administrative claims  
3 bar date for the Chapter 11 period through May of 2009. The  
4 debtors' confirmed Chapter 11 plan was not consummated because,  
5 asserting breaches, the plan investors under that plan refused  
6 to close in April of 2008. That left Delphi with a significant  
7 hole in the required funding for the confirmed plan. Delphi  
8 then spent close to a year dealing with ways to plug that hole  
9 as well as to address the further deterioration in the  
10 financial markets and in their perception of Delphi's value,  
11 which led to a substantially different approach, ultimately, to  
12 their exit from Chapter 11 under a Chapter 11 plan.

13           The debtors, in assessing their ability to emerge from  
14 Chapter 11, and having entered into an agreement with an entity  
15 called Platinum, as well as General Motors, that would have  
16 provided for that combined entity's acquisition of most of the  
17 debtors' business operations in return for sufficient cash to  
18 deal with a portion of the administrative claims against the  
19 debtors, plus stock -- I'm sorry, plus forms of contingent  
20 consideration -- having entered into that transaction, the  
21 debtors determined that they needed prompt means to calculate  
22 the outstanding administrative claims other than the debtor-in-  
23 possession financing claims against them, and, therefore,  
24 obtained from the Court, in connection with establishing  
25 procedures for consideration of the proposed modification to

1 the Chapter 11 plan involving GM and Platinum, the  
2 administrative claims bar date.

3 The bar date notice provided for, for purposes of a  
4 bar date, fairly short notice, but given the timing constraints  
5 that the debtors faced, including, in essence, a week-to-week  
6 extension of enforcement of remedies under the DIP facility and  
7 a clear and short deadline from GM and Platinum, such notice  
8 was appropriate under the circumstances.

9 The debtors sent out the notice and received timely  
10 administrative claims from approximately 2,400 claimants. The  
11 claims procedures motion that is on the calendar for later  
12 today states that approximately one billion dollars of  
13 administrative claims were asserted in those proofs of claim,  
14 plus unliquidated amounts.

15 Ultimately, the proposed modified plan was itself  
16 modified, although not materially so for purposes of the issues  
17 before me today -- and instead of Platinum acquiring  
18 significant assets under the plan, along with GM, Platinum was  
19 replaced by the debtors after an auction process by a  
20 consortium of the debtor-in-possession lenders. And that  
21 group, plus GM, entered into an MDA with the debtors, which  
22 formed the basis for the modified plan. The Court held a  
23 hearing on that modification and approved it on July 29th, two  
24 weeks after the administrative claims bar date.

25 The rough structure of the plan provides for the

1 continuation of most of the debtors' businesses, either in the  
2 hands of a GM acquisition company with respect to certain  
3 facilities that primarily manufacture parts for GM vehicles, as  
4 well as other assets that would go to the DIP lender  
5 acquisition group.

6 The third split of the debtors' assets would be  
7 retained by the debtors, since neither GM nor the DIP  
8 acquisition group wanted to acquire them. In addition, that  
9 entity that would continue to hold those assets would receive a  
10 cash payment by GM to enable that entity to pay administrative  
11 claims against it that were not being assumed in connection  
12 with the purchase of ongoing operations by the DIP acquisition  
13 vehicle and GM acquisition vehicle. And that amount of cash  
14 was determined by the debtors in consultation with various  
15 constituents, including GM, to be sufficient to have the  
16 surviving debtor entity meet its obligations under the plan,  
17 including the payment of allowed administrative claims.

18 The Court took testimony on that aspect of the  
19 proposed plan modification in the form of an affidavit by  
20 Mr. Stipp, in which he went through his analysis of likely  
21 sources and uses of cash to pay that entity's administrative  
22 claims. No one cross-examined Mr. Stipp. And based upon my  
23 review of the MDA, the modified plan and the affidavits  
24 submitted in support thereof, I concluded that the plan, as  
25 modified, was feasible: that is, that it was not likely to be

1 succeeded by a liquidation under Chapter 7 and that it could be  
2 performed, including the payment of administrative claims, as  
3 contemplated by the plan.

4 The debtors sent out notice of the administrative  
5 claims bar date as required by my order establishing the bar  
6 date, and notice was actually received by Plymouth Rubber  
7 Company, Inc. on -- it is acknowledged to have been received by  
8 Plymouth Rubber Company, Inc. on July 9, 2009. That's set  
9 forth in the affidavit in support of Plymouth's motion of  
10 Mr. Collins.

11 The debtors sent that notice to the address in their  
12 post-petition purchase order between them and Plymouth Rubber  
13 Company, LLC -- the same location. The address on the envelope  
14 was to Plymouth Rubber Company, Inc., which had been the entity  
15 with which the debtors had done business prior to Plymouth's  
16 Chapter 11 reorganization.

17 Mr. Collins, as I said, received the notice, which was  
18 also sent to numerous other locations to Plymouth Rubber  
19 Company, Inc., including to the counsel that filed the proof of  
20 claim on behalf of Inc. in the Chapter 11 case. Mr. Collins  
21 did not open the notice but, instead, on July 10th, put it, and  
22 apparently some other correspondence, in an envelope and  
23 forwarded it to Mr. Schultz, who is described in the Collins  
24 affidavit as a representative of Plymouth Rubber, LLC's parent,  
25 or at least an affiliate, retained to manage Plymouth's

1 affairs, Versa Capital Management, Inc., which also manages the  
2 funds which directly own the equity interest in Plymouth  
3 Rubber.

4 Although mailed on July 10th, according to  
5 Mr. Collins, the notice was not received by Mr. Schultz until  
6 July 16th, at which point Mr. Schultz, unlike Mr. Collins,  
7 opened the package, read the notice and immediately contacted  
8 the debtors, seeking an extension of the bar date, which was  
9 not agreed to.

10 It's undisputed that Plymouth did not file the proof  
11 of claim and/or seek approval of an extension until July 30th,  
12 after the plan modification hearing.

13 Plymouth requests that the Court consider its  
14 administrative claim timely on a number of different grounds,  
15 although most of the focus, properly so, of this hearing, has  
16 been on the ground of excusable neglect. Before I deal with  
17 that issue and those factors, let me briefly deal with the  
18 other bases for Plymouth's requested relief.

19 First, Plymouth contends that the Court did not have  
20 power to establish the administrative claims bar date, given  
21 the treatment of the administrative claims bar date in the  
22 original plan and the confirmation order. The plan itself  
23 contemplated, in the definition of "administrative claim," the  
24 potential for establishing a different administrative claims  
25 bar date than was set forth in the plan, which was a date

1 forty-five days after the confirmation of the plan. The plan  
2 also reserved fully the debtors' rights in the event that the  
3 plan did not go effective, which clearly was the case.

4 That plan, as I noted, contemplated a very different  
5 outcome for creditors than the current modified plan. Not only  
6 was there no issue of the payment of all administrative claims,  
7 requiring no determination, as a practical matter, by the Court  
8 as to feasibility for potential failure to cover administrative  
9 claims, but also the plan provided for full payment of  
10 unsecured creditors at a deemed plan value, and a substantial  
11 return to shareholders. Consequently, the plan's  
12 administrative claims bar date provision was appropriate for  
13 that structure -- again, one where there was really no issue as  
14 to whether the debtors would be able to pay all asserted  
15 administrative claims.

16 The confirmation order similarly provided for a forty-  
17 five day post-confirmation administrative claims bar date and  
18 stated that it would govern in light of -- in the event of a  
19 conflict between the plan and the confirmation order. And  
20 clearly it was an extant order. However, the debtors' need to  
21 set an earlier bar date, given the changes to their plan, was  
22 clear and required the establishment of a different bar date,  
23 clearly, in the context of the deadlines they were facing. The  
24 Court considered such a request to be appropriate, both in  
25 light of the rights that the debtors reserved for themselves

1 under the confirmed but not consummated plan, as well as under  
2 the Court's ability to amend the confirmation order, which on  
3 this point, was quite clearly outdated.

4 Therefore, I believe that Plymouth's argument that the  
5 Court exceeded its authority in setting a new administrative  
6 claims bar date order, and that Delphi and the other parties  
7 should be governed in this respect by the terms of the  
8 confirmed plan and the confirmation order entered in 2008, is  
9 not well taken and is denied.

10 Next, Plymouth argues, as a matter of due process,  
11 that the notice to it of the administrative claims bar date was  
12 deficient. It does so on two grounds. The first is that it  
13 asserts the debtors were involved in post-petition litigation  
14 commenced by the debtors in state court in Michigan against  
15 Plymouth as well as subsequent litigation commenced by a third  
16 party in Massachusetts. The second is that the debtors knew  
17 that Plymouth was represented by counsel in that litigation,  
18 and, therefore, that in addition to the other places that the  
19 debtors provided Plymouth with notice, they should have  
20 provided notice to litigation counsel in the Michigan and  
21 Massachusetts litigation. It should be noted that those counsel  
22 did not file a notice of appearance in the Chapter 11 case and  
23 that, in fact, they have not appeared in the Chapter 11 case  
24 until this current motion.

25 The motion relies upon, primarily, on this point, In

1 re Grand Union Company, 204 B.R. 864 (Bankr. D. Del. 1997), in  
2 which the bankruptcy court concluded in that case that the  
3 debtors' direct mailing of notice to personal injury tort  
4 claimants represented by counsel was inadequate notice of the  
5 bar date, and that the notice should have been provided to the  
6 personal injury counsel that Grand Union was dealing with.  
7 That case flies in the face of a number of cases in the Second  
8 Circuit, including in the Southern District of New York, which  
9 state that notice requirements under the Bankruptcy Code,  
10 including in respect of bar dates (and notices of similar  
11 consequence), do not have to be sent to counsel representing  
12 the claimant, but may instead only be sent -- or need only,  
13 instead, be sent to the claimant itself. See, for example, In  
14 re Brunswick Baptist Church v. Brunswick Baptist Church, 2007  
15 U.S. Dist. LEXIS 3319 (N.D.N.Y. Jan. 16, 2007); In re  
16 Alexander's Inc. 176 B.R. 715 (Bankr. S.D.N.Y. 1995); In re  
17 R.H. Macy & Company Inc. 161 B.R. 355 (Bankr. S.D.N.Y. 1993);  
18 and Dependable Insurance Company v. Horton, 149 B.R. 49 (Bankr.  
19 S.D.N.Y. 1992).

20 I should note further that Judge Walsh, in the Grand  
21 Union case, made it clear that he was focusing on the unique  
22 facts before him, where he found that the claimants who  
23 received the notice were unsophisticated and that all dealings  
24 in respect of their claims had previously been through their  
25 respective counsel. Clearly, Plymouth is not an



1 unsophisticated tort claimant here.

2           Consequently, based on the rationale of the Brunswick  
3 Church case and the other cases I've cited, I do not believe  
4 that the debtors were required to give notice to counsel of  
5 record in the pending litigation, particularly as, as I noted,  
6 that counsel had not appeared in the Chapter 11 case.

7           In addition, Plymouth contends that it filed through  
8 its counterclaim in the pending non-bankruptcy litigation an  
9 informal proof of claim that should be recognized by the Court,  
10 and clearly that that proof of claim was timely in that it was  
11 well before -- the counterclaim was filed well before the  
12 expiry of the administrative claims bar date. The argument,  
13 however, again runs afoul of case law in this district and the  
14 majority of the cases, including at the circuit court level  
15 elsewhere: that is, that the document giving rise to the  
16 informal proof of claim was not filed in this Court, but  
17 rather, instead, only in the courts in Michigan and in  
18 Massachusetts.

19           I should note that the cases that deal with this issue  
20 are generally dealing with pre-petition claims. But given the  
21 practice of treating claims and disputes related to missed bar  
22 dates for administrative claims the same way as the courts  
23 treat missed bar dates for pre-petition claims, I find those  
24 claims to be analogous -- those cases, I'm sorry, to be  
25 appropriate here, and for all intents and purposes on all

1 fours. For the close analogy see -- between disputes in  
2 respect of late administrative claims and disputes in respect  
3 of late pre-petition claims, see In re PT-1 Communications Inc.  
4 386 B.R. 402 (Bankr. E.D.N.Y. 2007).

5 The informal proof of claim rule, as far as I can see,  
6 has always, in the Second Circuit and in the Southern District,  
7 been applied to claims that were not filed in the form of a  
8 proof of claim, but that were filed in the bankruptcy court,  
9 that show an intention to make a demand for money from the  
10 debtors' estate. See In re G.L. Miller & Company Inc. 45 F.2d.  
11 115 (2d Cir. 1930), as well as the statement of the four-factor  
12 test -- factor one of which is that the claim, the documents  
13 have been timely filed with the bankruptcy court and had become  
14 part of the judicial record -- in In re Enron Corporation 370  
15 B.R. 90 (Bankr. S.D.N.Y. 2007).

16 The rationale for this, again, is the collective  
17 nature of a bankruptcy case and the need to put more than just  
18 the debtor on notice of the existence of the claim. See also  
19 In re M.J. Waterman & Associates Inc. 227 F.3d. 604 (6th Cir.  
20 2000), and In re Trans World Airlines Inc. 182 B.R. 102 (D.  
21 Del. 1995), which was reversed in part and affirmed in part,  
22 reversed on other grounds, at 96 F.3d. 687 (3d Cir. 1996).  
23 Consequently, I don't believe that the complaint or the  
24 counterclaim asserted in the Massachusetts District Court  
25 action and the Michigan State Court action would constitute an

1 informal proof of claim.

2 Lastly, the movant contends that notice was improper  
3 because it was delivered, albeit at the same address, to  
4 Plymouth Rubber Company, Inc. as opposed to Plymouth Rubber  
5 Company, LLC. The change in name resulted from the Chapter 11  
6 reorganization of Plymouth Rubber Company, Inc., which is the  
7 entity that had filed the proof of claim against the debtor's  
8 estate. The emerged, reorganized debtor changed its name to  
9 Plymouth Rubber Company, LLC as the successor to Plymouth  
10 Rubber Company, Inc., and that was the entity, again at the  
11 same address, with which the debtor contracted post-petition  
12 under the contract that is now the subject of the dispute in  
13 Michigan and Massachusetts.

14 Plymouth contends that because the notice was sent to  
15 "Inc." as opposed to "LLC," albeit at the same address, that  
16 notice was constitutionally deficient. Under the facts before  
17 me, however, I do not accept that argument. As set forth in  
18 Mr. Collins' affidavit and in the motion itself, Mr. Collins  
19 was the sole employee of Plymouth Rubber after it had  
20 determined to wind down its affairs. He was retained by the  
21 managing - or manager for Plymouth Rubber, LLC as well as the  
22 manager for other investments owned by the fund that owned the  
23 debtor, Versa Capital Management. And I believe that, as  
24 evidenced by the fact that Versa opened the notice and that  
25 Versa had hired Mr. Collins to look after LLC's affairs, and

1 that, therefore, he was acting as Versa's agent in this matter,  
2 there was sufficient actual notice as of July 9th for due  
3 process purposes.

4 The issue then comes down to whether the late filing  
5 of the proof of administrative claim should be permitted under  
6 Bankruptcy Rule 9006 for excusable neglect. A claims bar date  
7 is an important milestone in most Chapter 11 cases, and clearly  
8 here the administrative claims bar date was an important  
9 milestone in this case for the reasons that I've already  
10 stated. See First Fidelity Bank N.A. v. Hooker Investments  
11 Inc.(In re Hooker Investments Inc.), 937 F.2d. 833, 840 (2d  
12 Cir. 1991), in which the Court said, "A bar order does not  
13 function merely as a procedural gauntlet, but as an integral  
14 part of the reorganization process." See also In re Musicland  
15 Holding Corporation, 356 B.R. 603, 607 (Bankr. S.D.N.Y. 2006).

16 In most cases, the filing of a bar date order and the  
17 existence of a bar date enables the debtor and other  
18 constituents to determine whether the projected payments under  
19 a plan will actually satisfy the parties' expectations; and, in  
20 particular, an administrative claims bar date enables the  
21 parties to determine whether the plan they're proposing is  
22 feasible, in that administrative claims need to be paid in full  
23 for a plan to be confirmed and consummated.

24 Nevertheless, the bankruptcy court may enlarge the  
25 time for filing proofs of claim where the failure to act was

1 the result of excusable neglect, under Bankruptcy Rule  
2 9006(b)(1). The U.S. Supreme Court has adopted a two-part  
3 framework for the movant to establish its excusable neglect  
4 under Rule 9006(b)(1). The movant has the burden in this  
5 regard. See Midland Cogeneration Venture Limited Partnership  
6 v. Enron Corporation 419 F.3d. 115, 121 (2d Cir. 2005).

7 That framework was set forth in Pioneer Investment  
8 Services Company v. Brunswick Associates Limited Partnership,  
9 507 U.S. 380 (1993). First a failure to file the proof of  
10 claim must have been caused by neglect, which the Court defined  
11 as inadvertence, mistake or carelessness, including intervening  
12 circumstances beyond the party's control. Id. at 388. A  
13 tactical, or simply a knowing, decision not to file a timely  
14 claim will not suffice.

15 Second, the movant's neglect must have been excusable,  
16 which is to be determined in the exercise of the Court's  
17 equitable discretion taking into account all relevant  
18 circumstances surrounding the failure to file a timely claim,  
19 id. at 395, guided, however, by the following four factors:  
20 "the danger of prejudice to the debtor; the length of the delay  
21 and its potential impact on judicial proceedings; the reason  
22 for the delay, including whether it was within the reasonable  
23 control of the movant; and whether the movant acted in good  
24 faith." Id.

25 The Second Circuit has taken a "hard line" when

1 applying the Pioneer factors to motions under Rule 9006(b)(1)  
2 and other federal rules premised on excusable neglect. Again,  
3 see In re Enron Corporation 419 F.3d at 122. Although all four  
4 Pioneer factors should be considered, the Second Circuit places  
5 the greatest weight on the reason for the delay and whether it  
6 was in the movant's reasonable control. In re Musicland  
7 Holdings Corp. 356 B.R. at 607.

8 In the normal case, the movant has acted in good  
9 faith, for example, and that's the case here. Thus, the Second  
10 Circuit said, "In the typical case, three of the Pioneer  
11 factors, the length of the delay, the danger of prejudice and  
12 the movant's good faith, usually weigh in favor of the party  
13 seeking the extension. We and other circuits have focused on  
14 the third factor, the reason for the delay, including whether  
15 it was within the reasonable control of the movant. The  
16 equities will rarely, if ever, favor a party who fails to  
17 follow the clear dictates of a Court rule. Where the rule is  
18 entirely clear, we continue to expect that a party claiming  
19 excusable neglect will, in the ordinary course, lose under the  
20 Pioneer test." In re Enron Corporation 419 F.3d at 122-23; see  
21 also Canfield v. Van Atta Buick/GMC Truck Inc. 127 F.3d 248,  
22 250-51(2d Cir. 1997).

23 Factors other than the reason for the delay usually  
24 are relevant, therefore, only in close cases. In re Musicland  
25 Holdings Corporation 356 B.R. at 608. This is a somewhat close

1 case, in that I accept that Plymouth Rubber was clearly in  
2 wind-down mode, where it only had one employee, who, consistent  
3 with the very limited nature of its operations (which from  
4 Mr. Collins' affidavit, which is uncontroverted, pertained  
5 almost entirely to the two pending litigations) meant that  
6 Mr. Collins checked the post office box only roughly once every  
7 two weeks. In addition, the time for the bar date notice was  
8 shortened here from the normal time that would usually be  
9 provided. And, finally, there was potentially some room for  
10 confusion, given that the notice was addressed to "Inc." as  
11 opposed to "LLC."

12 On the other hand, I find it very hard to understand  
13 why, given Mr. Collins' sole function, which appears to be to  
14 monitor the mail, and the fact that he did so only roughly once  
15 every two weeks, he did not open the mail, but instead simply  
16 forwarded it to Mr. Schultz of Versa. It would not seem to me  
17 that he should have done that, given that Plymouth had  
18 established the P.O. box that he checked as opposed to setting  
19 up an automatic forwarding from Plymouth's address to Versa's.  
20 It would appear, instead, to me appropriate for Mr. Collins to  
21 have acted as someone who actually read the mail as opposed to  
22 as a second mailman for delivery purposes.

23 So, clearly, it was within Plymouth's control to have  
24 had notice of the bar date, at least by July 9th. Moreover,  
25 Plymouth did not file its claim until after the hearing on plan

1 modification, which it needn't have waited for. It had the  
2 claim or was aware of the late claim issue on July 16th, but,  
3 nevertheless, waited two weeks thereafter to do so. So, all  
4 things being considered, it appears to me that while this is a  
5 somewhat close case, the neglect here was largely within the  
6 control of Plymouth.

7 Secondly, while the time between the bar date and the  
8 filing of the claim was relatively short, I conclude that there  
9 was prejudice to the debtor and other parties that resulted  
10 from the delay. If, in fact, the responsibility for paying  
11 this administrative claim, to the extent it is allowed, rested  
12 with either GM or the DIP lender acquisition vehicle, it would  
13 appear to me, particularly given the balance of factors on  
14 whether the delay was within Plymouth's control, that the lack  
15 of prejudice to the estate would have argued for letting the  
16 claim be filed late. (The fact that some party receives a  
17 smaller distribution or another third party pays more money as  
18 a result of a claim being allowed to be filed late is not  
19 sufficient prejudice, it is not the type of prejudice that the  
20 courts have in mind when they evaluate the prejudice factor  
21 under Pioneer.)

22 However, here, I believe there is prejudice to the  
23 estate. And also, again, some blame should be laid on Plymouth  
24 for causing this prejudice by not filing the claim until after  
25 the plan modification hearing. As represented by Mr. Butler,



1 who clearly was involved in the preparation for the plan  
2 modification hearing and the debtors' efforts to determine  
3 whether, in fact, the MDA would result in a feasible plan, the  
4 calculation of likely administrative claims against a surviving  
5 debtor entity was a key factor in moving forward with the  
6 hearing on July 29th.

7 It's been stated that a demand number under the  
8 counterclaim by Plymouth is approximately twenty million  
9 dollars. That number would have had a significant impact on  
10 the debtors' presentation of the modification of the plan on  
11 July 29th and the Court's consideration of whether the plan is  
12 feasible or was feasible, and would have, if asserted as a  
13 recovery against the debtors -- the surviving debtors, as an  
14 administrative claim it could have had a very significant  
15 impact on feasibility. Consequently, it would appear to me  
16 that although the delay was short, it was very significant, and  
17 that both the debtors as well as the other parties to the MDA,  
18 and ultimately the Court, moved ahead in reliance on that claim  
19 not being asserted.

20 So, that prejudice, as well as my conclusion that the  
21 lateness of the claim, first in terms of its being verbally  
22 asserted only on July 16th and then actually formally asserted  
23 after the plan modification hearing, was largely, if not  
24 entirely, within the control of Plymouth, leads me to deny  
25 Plymouth's motion.

1 Obviously, to the extent that it is asserting a right  
2 to setoff or recoupment, the lateness of the claim should not  
3 matter, so that what this ruling effectively does is preclude  
4 Plymouth from an affirmative recovery against the debtor's  
5 estate as opposed to, again, a recoupment or setoff right in  
6 the Michigan and Massachusetts litigation.

7 So Mr. Butler, you can submit an order to that effect.

8 MR. BUTLER: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. BUTLER: Your Honor, the last matter on the agenda  
11 for today, matter number 8, is a motion for authority to apply  
12 the claims objection procedures to administrative expense  
13 claims, filed at docket number 18715. Your Honor, by this  
14 motion, what we're seeking to do is to use the claims  
15 procedures that Your Honor is familiar with, that have been  
16 running on a separate claims track for the last two and a half  
17 years, to apply those to administrative claims. And I think it  
18 goes without saying that the -- and I think Your Honor has  
19 observed in the past, that the procedures that have been  
20 adopted by the Court here back on December 7th of 2006 at  
21 docket number 6089, have served the debtors well and have dealt  
22 with an expeditious treatment of almost 17,000 proofs of claim,  
23 and through some 34 omnibus claims objections that addressed  
24 over 14,000 of those claims, and have resulted in the  
25 disallowance or withdrawal of over 10,000 of those claims. So